POLITICAL OVERSIGHT AND THE DETERIORATION OF REGULATORY POLICY

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If political oversight is a good thing, then it is possible to have too much of a good thing. During the Reagan and Bush administrations, presidential and legislative oversight of regulatory policy reached its high-water mark, yet the effectiveness of regulatory policy deteriorated as a result. The goal of this article is to explain why the evolution of oversight produced this anomalous result and what steps Congress and the President can take to rectify the situation.

The analysis that follows models the relationship between an agency and its political overseers—the President and Congress—as one of “principal” and “agent.” The existence of two principals creates a “negative-sum” oversight game: the success of one principal in obtaining its first preference limits the other principal from obtaining its first preference. The fact that constitutional arrangements and political realities give the White House more power to influence regulatory policy produces an unstable equilibrium. When the White House escalates its oversight efforts, Congress responds in a futile attempt to catch up, producing additional oversight by the White House. This cycle of competition has led both branches into activities that have harmed regulatory policy; namely the use of secrecy and micromanagement. As a result, congressional and White House conduct has not been politically accountable and neither branch has taken sufficient account of agency expertise and experience.

Government divided between the two political parties has increased the intensity of the oversight game, but the election of President Clinton will not eliminate the oversight game or the dysfunctions it has produced. The need to address such dysfunctions is most pressing under divided government, and the political opportunity for reform is better now that one party controls Congress and the executive


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branch. Reform will require that both branches disclose more about their oversight activities, emphasize oversight that provides a general direction for regulatory policy, and engage in joint oversight activities.

The analysis in support of these conclusions proceeds in five steps. Part I describes the "oversight game" or the competitive relationship between presidential and legislative oversight. Part II analyzes the conduct of the oversight game or the methods by which the White House and Congress attempt to control administrative discretion. Part III details that the impact of the oversight game has been less accountable government and reduced reliance on agency expertise and experience. Part IV recommends new rules for the oversight game or reforms that each branch can undertake to reduce secrecy and micromanagement. Finally, Part V assesses the impact of Executive Order 12,866, which specifies the Clinton administration's regulatory planning and review process.

I. The Oversight Game

The Constitution sanctions, and politics demands, both presidential and congressional oversight of regulatory agencies. The vesting of the executive power in the President,\(^1\) supported by the mandate that the President "shall take Care that the Laws be faithfully executed,"\(^2\) permits, and probably requires, the President's involvement in regulatory decisionmaking.\(^3\) The vesting of legislative power in the Congress\(^4\) implies legislative authority to investigate and gather information,\(^5\) if not the power to recommend policy solutions to agencies.\(^6\) In addition, the general constitutional expectation that legislators will voice the grievances and expectations of their constituents\(^7\) justifies legislative involvement in regulatory decisionmaking. Each branch's attempts to influence regulatory policy have long

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2. Id. § 3.
3. Peter L. Strauss & Cass R. Sunstein, The Role of the President and OMB in Informal Rulemaking, 38 Admin. L. Rev. 181, 197 (1986). Further, the President's authority to order agencies to prepare cost-benefit analyses, file other reports, or explain the reasons behind actions, is supported by Article II, which empowers the President to "require the Opinion, in writing, of the principal Officer in each of the Executive Departments, upon any Subject relating to the Duties of their respective Offices."
5. See Buckley v. Valeo, 424 U.S. 1 (1976) (stating that the investigation and the accumulation of information are legislative functions under separation of powers).
6. Because Congress can resort to legislation, including appropriations, to alter regulatory policy, it is inevitable that the threat of such intervention can, and will, be used to influence regulatory policy. See infra notes 97–109 and accompanying text (asserting that agencies pay attention to legislative policy demands to avoid legislative retaliation).
7. In Sierra Club v. Costle, 657 F.2d 298, 409 (D.C. Cir. 1981), Judge Wald observed: Americans rightly expect their elected representatives to voice their grievances and preferences concerning the administration of our laws. We believe it entirely proper for Congressional representatives rigorously to represent the interests of their constituents before administrative agencies engaged in informal, general policy rulemaking, so long as individual Congressmen do not frustrate the intent of Congress as a whole... nor undermine applicable rules of procedure.
been a political fact of life, although the outer boundaries of their constitutional authority remain uncertain.8

This section seeks to explain the relationship between presidential and legislative oversight by relying on agency theory as an organizational framework. Analysis indicates not only that oversight is difficult to implement, but also that the contest between the two branches to control regulatory policy is an important added complication.

A. The "Principal-Agent" Problem

Organizations are formed in response to collective action problems that constrain individuals from undertaking common action that would be to their mutual benefit.9 Those who form an organization—the "principals"—will inevitably have to depend on "agents" to obtain the gains from collective action,10 yet these gains can be lost when an agent's self-interest diverges from a principal's goals.11 This divergence is characterized as an "agency loss," and the potential for such losses is called the "agency problem."12

Government, as a response to collective action problems,13 presents two agency problems. When citizens delegate authority to government, they risk that elected officials will act in their own self-interest and thereby prevent collective gains.14 Elected officials have their own agency problem: They risk that agency administrators will act in their own self-interest rather than follow the officials' preferences.15 For this last reason, both Congress and the President engage in oversight.

While others have analyzed political oversight as an agency problem,16 they

8. See infra notes 196–99 and accompanying text (discussing the extent to which Congress can constitutionally require aspects of presidential oversight to be disclosed).
10. D. Roderick Kiewiet & Matthew D. McCubbins, The Logic of Delegation: Congressional Parties and the Appropriations Process 24 (1991). Kiewiet and McCubbins rely on a more general definition of "principal" and "agent" than is used in the economics literature. Whereas the economic definition of principal is a person who offers a binding contract to another person—the agent—for the performance of specified services, they state that an agency relationship is established "when an agent is delegated, implicitly or explicitly, the authority to take action on behalf of another, that is, the principal." Id. at 239, ch. 2, n.1. The same definition is adopted here.
11. Id. at 24–25.
12. Id. Professor Revesz characterizes agency losses as "divergence costs," which he defines as the difference between the benefits that would accrue to a principal if an agent were completely loyal and the benefits that actually accrue given the agent's own preferences. Richard L. Revesz, Specialized Courts and the Administrative Lawmaking System, 138 U. Pa. L. Rev. 1111, 1140 (1990).
have not accounted for the fact that regulatory oversight by one branch increases "agency losses" for the other branch, making the relationship between the President and Congress a "negative-sum" game. The next section explains this and other sources of agency losses.

B. SOURCES OF AGENCY LOSSES

The capacity of either the President or Congress to dictate regulatory policy is constrained by three features of modern regulatory government. Each branch is hindered by the "delegation dilemma," information asymmetries, and the "negative-sum" nature of presidential and legislative competition concerning oversight.

A principal can avoid agency losses by limiting an agent's discretion, but this step can also make it more difficult for the agent to serve the principal's interest.\textsuperscript{17} The longstanding preference to delegate authority to administrative agencies under broad and vague standards reflects this dilemma. There are political reasons for vague and ambiguous legislative delegations, but such legislation also reflects the fact that delegating discretion to an expert, experienced agent can result in collective gains for the public.\textsuperscript{18} This fact creates a dilemma: the agency problem can be avoided if no delegation is made, but without such a delegation, collective gains may be reduced.

An agent's capacity to evade control is also abetted by the existence of information asymmetries. The agent usually possesses information that is either unavailable to the principal, or prohibitively costly for the principal to obtain.\textsuperscript{19} This disparity makes it possible for an agent to keep information concerning performance hidden, or use the information strategically to mislead overseers.\textsuperscript{20}

Finally, efforts by one branch to control agency discretion can be a source of agency losses for the other branch, as McCubbins, Noll, and Weingast have demonstrated.\textsuperscript{21} As long as an agency adopts a policy option favored by the House, Senate, or the President, no change in that choice is possible, because the "player" favored by the agency's choice can choose not to support, or to veto, any corrective legislation. As a result, "each of the three wants to minimize the chance that one of the other two will influence the agency against its interests" and "all have an ex post incentive to spend resources persuading the agency to sway policy their way."\textsuperscript{22}

Oversight becomes a "negative-sum" game for the previous reason, and as a

\textsuperscript{17} See generally Kiewiet & McCubbins, supra note 10, at 26 (discussing how the federal government under the Articles of Confederation could not serve the interests of the people because it was not given adequate authority).


\textsuperscript{19} Kiewiet & McCubbins, supra note 10, at 25.

\textsuperscript{20} Id.


\textsuperscript{22} Structure and Process, supra note 16, at 439.
result, the President and Congress compete to control regulatory policy. The next section describes this competition and why the White House has a comparative advantage in obtaining the President’s policy preferences.

II. Conduct of the Oversight Game

A nongovernmental principal can reduce agency losses by hiring loyal agents, relying on monitoring and reporting procedures, and by employing institutional checks. There are counterparts to each of these methods of control in the governmental context, but constitutional, political, and institutional factors constrain the effectiveness of each method. Because these limitations impact Congress more than the White House, the President has a comparative advantage in agency oversight. Thus, although Congress has expanded its own oversight mechanisms, it has not been able to match the President’s control of agency government.

A. Appointments

The President starts with an important advantage over Congress: Congress has only a limited role in the appointment process. Although the President’s advantage is limited by factors that restrict the use of appointments as a method of reducing agency losses, a significant advantage still exists.

The appointment of loyal administrators is a significant source of presidential power over agency decisionmaking, even in the independent agencies. The Reagan administration sought to strengthen this source of presidential control by choosing appointees on the basis of their ideological affinity, rather than their expertise or experience, and by carefully screening candidates for secondary appointments, rather than permitting cabinet officers and other administrators to make these choices.

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23. Decisionmaking theorists describe potential decisions as being “zero-sum” or “negative-sum” games. Morton D. Davis, Game Theory: A Nontechnical Introduction 75 (rev. ed. 1983). In a “zero-sum game” involving two persons (or entities), one person’s gain from the decision will equal the amount that the other person loses. Id. In other words, “a zero-sum game is any game where the losses exactly equal the winnings.” Lester C. Thurow, The Zero-Sum Society 11 (1980). In a “non-zero-sum” game, or a “negative-sum” game, one person gains and another loses, but the losses do not exactly equal the winnings. Davis, supra, at 82. The reason is that both persons benefit from the decision, but not to the same extent. Id. at 83. Although the competition between the President and Congress to control regulatory policy can be a “zero-sum” game, it is more often a “negative-sum” game because the first preference of either entity is unlikely to result in no political benefits to the other entity. The extent to which such decisions are zero-sum games will increase the level of competition between the two branches over regulatory policy, and the dysfunctions created by this competition that are identified in this article will be intensified.


27. Walter Williams, Mismanaging America: The Rise of the Anti-Analytic Presidency 84 (1990); see also Glen O. Robinson, American Bureaucracy: Public Choice and Public Law 107 (1991) (discussing how the success of the Reagan administration’s deregulation drive, for example, has been attributed to the appointment of “the right people to the agencies”).
Although the appointment power is a powerful tool, it has limitations as a method of reducing agency losses. Because any screening and selection mechanism requires an evaluation of potential candidates based on limited information, agents may perform in unanticipated ways after they are appointed, or lack the ability to carry out the President’s program. In addition, appointees can become “captured” by their staffs in the sense that agency employees can use their ability to control the flow of information to skew decisionmaking. Finally, a President may be forced by political pressures to appoint a compromise candidate, or an appointee’s “residual loyalty” may be overcome by the shifting obligations that arise on particular policy issues. Even the Reagan administration, with its emphasis on choosing loyal appointees, did not escape these limitations.

Although the President’s capacity to control discretion by the appointments process is constrained, Congress’s ability to influence agencies through the appointment process is even more constrained. Most principals can appoint and remove their agents, but Congress cannot. It can limit the President’s authority to remove administrators because of policy disagreements, however, and it has done so in the “independent” agencies. The designation of an agency as “independent” should result in additional congressional influence because it gives administrators some freedom to ignore presidential policy demands. Many significant regulatory agencies are not independent agencies, however, and, as noted earlier, Presidents have been able to influence regulatory policy at the independent agencies through the appointment process.

The Senate has the prerogative of rejecting presidential nominees, but Sena-

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28. Cf. Kiewiet & McCubbins, supra note 10, at 29-31 (discussing how signaling by a candidate may bridge this information gap and provide information about the candidate’s suitability as an agent).
29. See, e.g., JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT (1989) (“For every successful appointment [in the Reagan administration] there was an unhappy surprise.”).
30. PIERCE ET AL., supra note 15, at § 4.3.1 (“The quality of agency appointments is obviously central to the effectiveness of administrative oversight . . . .”).
32. For example, President Reagan appointed William Ruckelshaus in 1983 to succeed Anne Gorsuch as the Administrator of the Environmental Protection Agency. The appointment occurred after Gorsuch’s mismanagement had led to extremely costly attacks on the administration in Congress and the press. The appointment “was essential to restoring the administration’s credibility on environmental issues precisely because of [Ruckelshaus’s] reputation for independence . . . .” PHILIP B. HEYMANN, THE POLITICS OF PUBLIC MANAGEMENT 81 (1987).
33. ROBINSON, supra note 27, at 107; see HEYMANN, supra note 32, at 25–27 (noting that an administrator’s professional or personal loyalties may put the person at odds with the administration’s policy preferences).
34. See infra note 87 and accompanying text.
38. Id. § 4.4.1b, at 91.
39. For example, the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA) are not independent agencies.
40. See supra note 26 and accompanying text.
tors typically believe that they should approve the President’s choice unless there are extraordinary reasons why a person should not be appointed.\textsuperscript{42} Senators do use the nomination process to instruct appointees concerning their policy preferences and, if possible, to obtain commitments to pursue those policies.\textsuperscript{43}

\section*{B. Monitoring and Oversight}

The Reagan administration recognized the constraints that impact the appointment process as a method of control, and responded by instituting a reporting and monitoring system that was extended by the Bush administration.\textsuperscript{44} Although Congress responded by expanding its own monitoring capabilities, it was unable to match the effectiveness of the White House process.

Principals often must judge an agent’s suitability based on job performance because time, information, and other constraints make it difficult to choose loyal agents.\textsuperscript{45} Methods of monitoring performance in the political context involve what Matthew McCubbins and Thomas Schwartz have termed either “police patrol” or “fire alarm” oversight.\textsuperscript{46} The former involves audits, investigations, and other forms of random direct oversight.\textsuperscript{47} The latter involves reliance on third parties to report deviations by agents.\textsuperscript{48}

The Reagan administration, which engaged in police patrol oversight, had an

\begin{footnotesize}\begin{enumerate}
\item[42.] Christopher H. Foreman, Jr., Signals from the Hill: Congressional Oversight and the Challenge of Social Regulation 77 (1988).
\item[43.] Professor Macey finds that if the appointments power vests too much power in the President, the fault lies with the Senate, which has acquiesced in this result, rather than with the President, who simply is playing the oversight game as well as possible. Jonathan R. Macey, Separated Powers and Positive Political Theory: The Tug of War over Administrative Agencies, 80 Geo. L.J. 671, 699 (1992). Macey observes that besides the obvious palliative of taking a more active role in confirmation hearings, the Senate could respond even more forcefully to any perceived usurpation of authority. For example, the Senate or a subcommittee of the Senate formally could recommend to the President specific people it deems appropriate to fill particular vacancies, and then demand that the President provide reasons for refusing to nominate somebody on the list. Alternatively, the Senate could condition funding for projects considered particularly important by the President upon the satisfactory performance of regulatory agencies’ duties.\textit{Id.}
\item[44.] Professor Macey is undoubtedly correct that the Senate could bring additional political pressure to bear on the President. The problem with this approach, however, is that it would likely escalate the cycle of competition between the two branches, resulting in the type of dysfunctions that have already occurred. For example, the Senate’s failure to approve any nominee to fill the position of Administrator of the Office of Information and Regulatory Affairs (OIRA) during the Bush administration increased the level of distrust between the branches and was apparently part of the reason for increased secrecy in the White House concerning regulatory oversight. See infra note 153 and accompanying text.
\item[45.] Foreman, supra, note 42, at 78; Pierce & Shapiro, supra note 18, at 1199 n.142.
\item[46.] The three administrations prior to President Reagan did utilize some form of monitoring and reporting oversight, see Pierce et al., supra note 15, § 9.5.2, but these efforts did not constrain the agencies to any significant extent. Christopher C. DeMuth, Constraining Regulatory Costs Part I: The White House Reviews Programs, Reg., Jan./Feb. 1980, at 21.
\item[47.] Kiwiet & McCubbins, supra note 10, at 31.
\end{enumerate}\end{footnotesize}
initial advantage over Congress, which at first retained the less effective fire alarm approach. Congress eventually adopted its own version of police patrol oversight, but this step did not overcome the White House’s comparative advantage. White House oversight was more systematic, and presidential agents had more power over agency decisionmaking than their legislative counterparts. This section compares the oversight capacity of the two branches, and the next section compares the ability of each branch to influence agency policy decisions.

1. White House Oversight

Oversight during the Reagan and Bush administrations occurred under a series of executive orders that established reporting requirements monitored by the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB). Beginning with Executive Order 12,291, which required executive agencies to assess the benefits and costs of proposed rules, President Reagan started requiring assessment of family, federalism, property, and trade impacts. The administration also required executive agencies to submit an annual regulatory agenda, and they were prohibited from working on regulations not approved by OIRA. The Bush administration required executive agencies to perform a preliminary cost-benefit analysis to justify placement of a proposed regulation on an agency’s regulatory agenda, extended Executive Order 12,291 to almost every form of agency action except adjudication, and ordered agencies to assess the impact of regulations on civil litigation. President Bush also instituted a ninety day regulatory moratorium in January 1992, and renewed it for another ninety days in April 1992, during

52. Memorandum from James MacRae, Jr., Acting Administrator and Deputy Administrator, Office of Information and Regulatory Affairs, to Heads of Selected Departments and Agencies, 1 (Nov. 29, 1990) (on file with author). OMB explains that in the context of a health and safety rule, an agency will have to identify the causal linkage between the hazard and the alleged health and safety risks, assess the potential human exposure and the likely effects on humans, and balance the likely costs of correction against the health and safety benefits to be obtained. Office of Management and Budget, Bulletin No. 91-04, Nov. 26, 1990, Appendix B, at B-3 (on file with author).
53. Memorandum from Dan Quayle, Jr., the Vice President, to Heads of Executive Department and Agencies 1-2 (Mar. 22, 1991) (on file with author). In this memorandum, the White House declared that agencies subject to E.O. 12,291 must prepare rulemaking impact analysis not only for proposed regulations, but also for “all agency policy guidance that affects the public” including “strategy statements, guidelines, policy manuals, grants and loan procedures, Advanced Notices of Proposed Rulemaking, press releases and other documents announcing or implementing policy that affects the public.” Id.
which time agencies were ordered to reassess previous regulations and report
the results to the White House.56

This web of reporting requirements created a systematic process of presidential
review, but much of what was reported went unanalyzed, or underanalyzed, as
a result of the small size of OIRA’s staff.57 Nevertheless, as discussed later, OIRA
was able to have a substantial impact by giving priority to the regulations of specific
agencies, to high-profile regulations, and to regulations that industries which
lobbied OIRA sought to weaken.58

2. Congressional Oversight

Congress employs a variety of monitoring and reporting methods,59 but the
efficacy of these approaches has been limited because, until recently, they have
been tied to a fire alarm approach.60 Congress has expanded its police patrol
oversight in the last few years, but the committee structure of Congress and the
members’ political incentives reduce the effectiveness of this second method of
oversight.

In fire alarm oversight, legislators depend on third parties to call to their attention
agency policies that deviate from congressional preferences.61 Congress has
strengthened this form of oversight by establishing agency disclosure requirements
such as notice and comment rulemaking62 and the Freedom of Information Act
(FOIA),63 but it also depends on the well-timed leak.64 The goal of fire alarm
oversight is to make “it very difficult for agencies to strategically manipulate
congressional decisions by presenting a fait accompli, that is, a new policy with
already mobilized supporters.”65

Legislators originally preferred the fire alarm approach because the more system-
tatic police patrol option did not pay sufficient political dividends.66 Fire-alarm

56. Id.; Bush Instructs Agencies to Adopt 90-Day Moratorium On Regulations, Antitrust & Trade Reg.
Rep. (BNA) 138 (Feb. 2, 1992). The Bush administration also developed, but did not implement, a
reporting program for agency risk assessment. White House Puts Risk Assessment Order on Hold, Citing
57. Harold H. Bruff, Presidential Management of Agency Rulemaking, 57 Geo. Wash. L. Rev. 533,
558 (1989).
58. See infra notes 89–90 and accompanying text.
59. Congress uses both hearing and nonhearing methods of oversight. Several types of hearings
might be employed including budgetary, oversight, and investigatory hearings. Joel Aberbach,
Keeping a Watchful Eye: The Politics Of Congressional Oversight 132 (1990); Pierce & Shapiro,
supra note 18, at 1199. Nonhearing methods include communications between an agency and a staff
member or legislator, program evaluations by congressional support agencies such as the General
Accounting Office (GAO), and staff investigations and field work. Aberbach, supra. Professor Aber-
bach ranked staff communications, program evaluations by agencies such as GAO, and oversight
hearings as the three most frequently used methods of oversight. Id.
60. McCubbins & Schwartz, supra note 46, at 167, 171.
61. Id. at 166; Kiewiet & McCubbins, supra note 10, at 33.
63. Id. § 552.
64. For example, efforts to weaken OSHA regulation during the first term of the Reagan admin-
stration were leaked by unsympathetic White House staffers to House staffers. Foreman, supra note
42, at 65.
oversight had the potential to generate favorable publicity without requiring a substantial time commitment from legislators, which permitted them to emphasize more politically profitable activities such as passing legislation. This approach did not result in systematic oversight, however. Congress "overlook[ed] many regulatory actions and often fail[ed] to subject the remainder to more than superficial scrutiny."  

Two changes in the political landscape altered the political incentives of oversight. Oversight became more popular as the budget deficit made it more difficult to establish new programs or expand old ones. At the same time, interest groups that were disfavored by White House oversight efforts demanded a more effective legislative response. Because of these developments, "there [were] greater benefits per unit of time spent by congressional personnel on an active police-patrol approach than before."  

Despite Congress's new emphasis on oversight, its efforts have been constrained by three factors. Agencies are usually subject to review by multiple committees, creating an uneven system of review, at least as compared to the hierarchical oversight system used by the White House. In addition, although the total amount of oversight has increased, the time that a legislator can give to any one agency is still limited by competing time demands, even if those demands involve oversight of other agencies. Finally, monitoring and reporting only reveals what an agency is doing; these activities do not automatically cause the agency to adhere to, or alter, a policy. As the next section reveals, the White House is in a better position to obtain its policy preferences than Congress.

C. INSTITUTIONAL CHECKS

To influence regulatory policy, both the White House and Congress employ "institutional checks," which involve the assignment to one agent the function of blocking undesirable actions by another agent. OMB and the Council on Competitiveness performed this function for the White House, while congressional committees (or their chairs) performed this function for Congress. Presidential "checkers" had more influence than their legislative counterparts because admin-

67. Id.
69. Richard J. Pierce, The Role of Constitutional and Political Theory in Administrative Law, 64 Tex. L. Rev. 469, 482-83 (1985); see Pierce & Shapiro, supra note 18, at 1201.
70. Aberbach, supra note 59, at 100, 102, 191.
71. Id. at 100, 190-91.
72. Id. at 102.
73. Bruff, supra note 57, at 543; Richard J. Lazarus, The Neglected Question of Congressional Oversight of EPA: Quis Custodiet Ipes Custodes (Who Shall Watch The Watchers Themselves), 54 Law & Contemp. Probs. 205, 230 (1991). EPA, for example, is subject to oversight by at least eleven standing House and Senate committees and up to 100 of their subcommittees. Id. at 211.
75. Kiewiet & McCubbins, supra note 10, at 34.
administrators were usually loyal to the President, and because the White House was in a better position to retaliate when administrators went their own way.

1. White House "Checks"

OMB's influence over regulatory policy was a product of two factors. First, although agencies were formally free to publish a regulation in the Federal Register without OMB's blessing,\(^76\) and occasionally did so,\(^77\) such intransigence was rare because few administrators were willing to engage in open defiance of the White House. This reluctance sprang from loyalty to the President, fear of being ostracized as someone who was not a team player, and desire to avoid OMB retaliation.\(^78\) OMB could retaliate by slowing its review of other regulations, refusing to clear congressional testimony, and reducing the agency's budget requests to be submitted to Congress.\(^79\) Second, only agency administrators had the clout to appeal the decisions of lower-level OIRA personnel, or even to get the agency's telephone calls returned by OMB officials. Yet because of the time involved—one meeting on a proposed regulation could take a half day, counting travel time—administrators were limited in the number of appeals they could make unless they were willing to divert time from their other responsibilities. Moreover, administrators had to husband the number of appeals they chose to implement lest they provoke the enmity of OMB.\(^80\)

The White House recognized and exploited these constraints in several ways. OMB took the position that agencies had to comply with its directives unless they appealed to the President,\(^81\) and it engaged in a "war of attrition" to obtain its policy preferences.\(^82\) Another tactic was to refer regulations to the Competitiveness

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\(^{76}\) See Exec. Order No. 12, 291, supra note 49, at § 3(f)(3) ("Nothing in this subsection shall be construed as displacing the agencies' responsibilities delegated by law.").

\(^{77}\) See Bruff, supra note 57, at 562 (citing two instances where agencies published regulations without OMB's approval).

\(^{78}\) Id. at 560–61; National Academy of Public Administration, Presidential Management of Rulemaking in Regulatory Agencies 26-27 (1987) [hereinafter NAPA Report].


\(^{80}\) Bruff, supra note 57, at 561.

\(^{81}\) See Letter from Richard E. Lyng, Secretary of USDA, to James C. Miller III, Director, OMB, (Oct. 3, 1988) (stating that Secretary of Agriculture objects to OMB's position that "the Executive Order permits OMB to extend indefinitely the time provided for its review of proposed or final Executive agency regulations," and that USDA "may not publish a proposed or final rule without OMB approval, and that the Secretary's only recourse in the absence of such approval is to appeal to the President") (on file with author).

\(^{82}\) Under Executive Order 12, 291, agencies were required to submit regulatory impact statements for any major regulation. Exec. Order No. 12, 291, supra note 49, at § 3. Because the methodology of calculating costs and benefits is inherently so imprecise, Thomas O. McGarity, Reinventing Rationality: The Role of Regulatory Analyses in the Federal Bureaucracy 125 (1991). OMB almost always had the option of finding problems with an agency's regulatory analysis if it chose to do so. Frank White, a former OSHA administrator, has explained how OMB used the existence of such methodological problems to prevail. Symposium: Remarks of Frank White, 4 Admin. L.J. 3, 25 (1990). White notes that although OSHA might have had a logical, plausible explanation for a policy choice, OMB would cite some contrary piece of evidence and doggedly insist that OSHA make a change in its proposed regulation. Eventually, OSHA became worn down and compromised in the interest of getting its rule out. White explains:
Council, or its predecessor in the Reagan administration, the Task Force on Regulatory Relief. The Competitiveness Council had additional leverage because of its proximity to Vice President Quayle.

Despite this "directory power," the White House was not omnipotent. Agencies were able to resist White House pressure when they had political support among powerful interest groups or members of Congress. Moreover, the White House's ability to assert these checks was only as good as its monitoring process, which was constrained by staffing limitations noted earlier. Nevertheless, Jim Miller's description of OMB as the "toughest kid of the block" was not hyperbole. Although it lost some battles, OMB was able to wield a heavy hand over regulatory policy.

The fact that OMB asserted a powerful influence over regulatory policy created an important agency problem. As part of the administrative bureaucracy, OMB

[When OSHA puts out a health standard, it sets a new exposure limit for the particular contaminant being regulated. The rule is generally fairly detailed as to how an employer must meet a particular exposure level with respect to any particular toxic chemical. And OSHA may say, for example, that the employer must take samples of that contaminant, in order to determine whether the employer is over the particular limit that OSHA set.

And OSHA may say that such sampling should be done four times a year. OMB will look at the provision, look at the record, look at the preamble, and say, "Well, there's nothing in the comments or the record to say that four times a year is the appropriate number, why didn't you pick two times a year?" And the agency will admit, probably, that commentators did not specially address the issue of sampling frequency. However, OSHA will argue that based upon its expertise in industrial hygiene, it is clear that there should be sampling, that four times a year is reasonable, and that there is a logical, plausible explanation for four times a year.

But OMB will continue to sort of nibble away at the agency, and eventually the agency gets worn down and in the interest of compromise says, "Okay, we'll require two times a year."

Id.


85. David Doniger, Senior Attorney, Natural Resources Defense Council, notes of Council staff members that "they see it as their prerogative to make the decisions on issues that rise to their attention." Kirk Victor, Quayle's Quiet Coup, 23 NAT'L J., 1676, 1678 (1991). The leverage of these entities was also enhanced by the fact that the Vice President, and sometimes the President, took credit for their actions. See Robert D. Hershey, Jr., Quayle Says Rule Review Is Saving $10 Billion, N.Y. TIMES, Apr. 3, 1992, at A16; Robert D. Hershey, Jr., White House Sees a Mission to Cut Business Rules, N.Y. TIMES, Mar. 23, 1992, at A13. The Council's power over policy was also enhanced by the fact it operated in secret, as will be discussed below. See infra part III.

86. Strauss, supra note 26, at 666-67.


88. See supra note 57 and accompanying text.

89. NAPA REPORT, supra note 78, at 26; see Percival, supra note 87, at 150 ("OMB has acquired virtual veto power over regulations it reviews").

90. See McGrath, supra note 82, at 291 ("[I]t is clear that OMB substantially influenced many of the most important rulemaking initiatives of the 1980s."); Thomas O. McGrath & Sidney A. Shapiro, Workers at Risk: The Failed Promise of the Occupational Safety and Health Administration 229-43 (1993) (describing OMB's impact on OSHA).
personnel present the "same type of monitoring and control problems . . . as the agencies they seek to influence." Indeed, anytime an OMB or Council staffer disagreed with an agency administrator, it was unclear who spoke for the President. Without the President's direct intervention, there would appear to be no method to determine which agent is representing the President's policy preference.

Of course, OMB officials were not without constraint. Both their proximity to the President94 and their loyalty to the administration's regulatory principals95 reduced agency losses. Nevertheless, information asymmetries and monitoring problems that produce agency losses still existed in this context.96

2. Congressional "Checks"

With the demise of the legislative veto, Congress lost its most powerful form of control over regulatory policy,97 but it can still pass legislation to overrule a regulatory decision or to reduce an agency's budget.98 Agencies will make concessions in their regulatory plans to head off such actions.99 But agencies can discount the possibility of retaliation when Congress is stymied by the lack of political agreement, information, or time needed to craft specific details,100 or by the threat

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92. ROBINSON, supra note 27, at 102. Professor Robinson asks, 'For instance, when the OMB seeks to influence NHTSA (Department of Transportation) to alter certain safety standards, how do we know which set of executive officers . . . speaks for the president? If the Justice Department declines to support an EPA decision on appeal, which agency represents the executive branch?' Id.

93. Nevertheless, it might be argued that presidential overseers are more likely to follow the President's preferences because they are not subjected to the problem of "staff capture." See DeMuth & Ginsburg, supra note 31, at 1085; Strauss & Sunstein, supra note 3, at 187. Once agency staff prepare information for presidential review, however, an agency administrator has the same data as presidential overseers. Moreover, if staff capture is a problem, the administrators at OMB and the Council are subject to the same fate. Id.

94. Strauss & Sunstein, supra note 3, at 191.

95. See supra note 27 and accompanying text.

96. See supra notes 19-20 and accompanying text.


98. Pierce & Shapiro, supra note 18, at 1198. For example, Congress was able to pass detailed environmental legislation in the wake of scandals at EPA during the first term of the Reagan administration. Sidney A. Shapiro & Robert L. Glicksman, Congress, the Supreme Court, and the Quiet Revolution in Administrative Law, 1988 DUKE L.J. 819, 825-28.

99. See FOREMAN, supra note 42, at 6 ("As a system . . . for enforcing accountability regarding agency behavior and policy choice—oversight succeeds."); HERBERT KAUFMAN, THE ADMINISTRATIVE BEHAVIOR OF FEDERAL BUREAU CHIEFS 47 (1981) ("But even if [members of Congress] had been less assertive, they would have commanded the attention of the chiefs because of what Congress is empowered to do to and for the agencies."); NAPA REPORT, supra note 78, at 21 (there are "incentives for agency officials to respond at every stage to the concerns of their congressional overseers"); see also R. DOUGLAS ARNOLD, CONGRESS AND THE BUREAUCRACY: A THEORY OF INFLUENCE 216 (1979) ("[W]henever bureaucrats suspect that their decisions might affect the size or shape of their supporting coalitions in Congress, they will be responsive to congressmen's preferences regarding those decisions, particularly to the preferences of coalition leaders and other strategically situated congressmen.")

100. Farina, supra note 24, at 508; see Pierce & Shapiro, supra note 18, at 1199 (describing difficulty of passing legislation).
of a presidential veto.\textsuperscript{101} The first two of these constraints should not be overstated. Congress often defers to its committees concerning specific and technical legislation,\textsuperscript{102} which makes it easier for a committee to obtain legislation overruling an agency policy. In addition, appropriations' riders or changes in appropriations are easier to push through Congress than substantive legislation.\textsuperscript{103}

Despite Congress's reliance on its committees, its influence has been limited by several factors. First, as noted earlier, monitoring was often unsystematic.\textsuperscript{104} Second, Congress was unable to use budgetary actions to contest deregulation initiatives. When a committee favored additional regulation, reducing an agency's budget, or forbidding it to work on certain projects, did not promote its ends.\textsuperscript{105} Last, but hardly least, when a committee and OMB were in direct competition to influence a specific decision, the committee had to overcome OMB's formidable powers described in the last section.

Congress is not without influence despite these constraints. Legislative overseers, by aggressively challenging the Reagan administration's regulatory relief initiatives, played a crucial role in undermining public support for deregulation.\textsuperscript{106} The pattern of committee influence reflects the previous constraints, however. Committees tend to monitor agency decisionmaking closely only if legislators have a particular interest in an agency or the committee is being lobbied to intervene. Moreover, a committee's power to direct a particular outcome is usually limited by the need to accommodate competing political interests. For this reason, a committee's leverage is usually greatest when agency decisionmaking is at some crucial juncture and a push by the committee will "tip" the result.\textsuperscript{107} A committee can also gain power over an agency once the agency is widely perceived to be "out-of-control," since this perception minimizes political opposition to the committee's efforts.\textsuperscript{108} Outside of these contexts, legislative influence over specific decisions is more limited. As a result, "most decisions by OMB during Reagan's presidency were probably little influenced by congressional monitoring."\textsuperscript{109}

\begin{footnotesize}
\begin{enumerate}
\item To prevail over a presidential veto, Congress must have a super-majority, which is unlikely except where there is broad public support for its efforts. Presidents Reagan and Bush were extraordinarily successful in sustaining their vetoes. See Ann Devroy, The Nation Changed but Bush Did Not, Wash. Post, Jan. 17, 1993, at A1, A28 (President Bush successful in all but one of more than three dozen vetoes); Maria Puente, Unblemished Vetoes Record May Haunt Bush, USA Today, June 22, 1992, at 4A (President Reagan successful in 78 of 87 vetoes).
\item James L. Sundquist, Congress and the President: Enemies or Partners?, in Setting National Priorities: The Next Ten Years, 583, 600 (Howard Owen & Charles Schultze eds., 1976).
\item Cf. Pierce & Shapiro, supra note 18, at 1199–1200 (Congress favors nonsubstantive controls which are easier to pass).
\item See supra note 69 and accompanying text.
\item Id. at 133.
\item Foreman, supra note 42, at 186–87.
\item See Barry R. Weingast & Mark J. Moran, The Myth of Runaway Bureaucracy--The Case of the FTC, Regulation, May/June 1982, at 33, 34–37 (explaining how legislative leaders have intervened to stop FTC regulatory excesses).
\item Foreman, supra note 105, at 133.
\end{enumerate}
\end{footnotesize}
The political science literature is in disagreement concerning the impact of legislative oversight,110 causing one commentator to conclude Congress’s effectiveness is “fitful.”111 More importantly for this analysis, congressional checkers have had less power over individual decisions than White House overseers. Not only has White House monitoring been more systematic, but OMB has had two additional advantages. Unlike the chair of a congressional committee, OMB’s administrators did not have to obtain the agreement of several other persons in order to take some position. In particular, OMB’s leaders did not have to deal with members of the opposite party. OMB could also more easily retaliate if it wanted. Whereas a committee had to pass legislation to carry out any retaliatory threat, OMB could implement its retaliation administratively.112

The fact that congressional committees lack influence over specific regulatory decisions is not necessarily undesirable. When committees direct policy choices, there is no guarantee that a committee’s preferred solution is representative of Congress as a whole.113 Indeed, the opposite may be true. Legislators often choose committee assignments because they have a parochial interest in the committee’s jurisdiction.114

Moreover, like the President, committees must rely on staff members to carry out oversight functions. Unlike their White House counterparts, however, congressional staffs are usually not in a position to hold up agency action until they obtain a change in policy.115 In addition, because each member of Congress supervises only a handful of agents, the agency problem in Congress appears to be less significant than in the White House where the President’s staff is much larger.116

D. THE INCENTIVE TO COMPETE

In the past twelve years both branches have increased their oversight efforts. The White House adopted an elaborate police patrol reporting and monitoring system backed by strong institutional checks, while Congress countered by increas-

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110. Mahaw, supra note 21, at 106.
111. Foreman, supra note 42, at 171 (“Oversight is at heart, then, a process of fitful policy implementation.”).
112. Shimberg, supra note 74, at 245–46.
113. Farina, supra note 24, at 510.
115. See supra notes 100–101 and accompanying text (asserting that legislative committees have less leverage than White House agents to obtain policy preferences).
116. A recent study finds that congressional staff members are reasonably accountable for their oversight activities. See ABRACH, supra note 59, at 129. Professor Aberbach finds that staffers attempt to serve the interests of their congressional principles because their efforts are easily observable by them:

Members may give [staffers] immense leeway to make decisions, may not even check what they do, but in the end they will form an opinion about whether and how much the actions of their committee units have helped or hurt them. Staffers do not want to be on the negative side of that judgment because they have both jobs and reputations to protect. (A reputation for effectiveness and influence in the policy area, after all, is what the staffer generally sells to his next employer.) . . .

If this line of argument is basically correct, then in the end oversight decisions are made either by committee members, especially by unit chairs, or by staffers acting in good faith as their agents. Id.
ing police patrol hearings. Because legislative efforts were less systematic, however, Congress was unable to match the effectiveness of institutional checks employed by the President. Thus, the White House was able to preserve, if not extend, the comparative advantage it obtains in the oversight game from the appointment of agency administrators.117

Each branch has been spurred to increase its oversight efforts by the actions of the other branch. In part, this competition was the result of a government divided between two political parties. ‘‘If ever there were an instance of the fulfillment of Madison’s expectation that ‘ambition [would check] ambition,’ ’’ Jerry Mashaw has observed, ‘‘the last two decades of regulatory politics have provided an example.’’118 But the next section explains that the oversight game also has another origin: what political scientists have termed the ‘‘administrative presidency strategy.’’

1. The Administrative Presidency

Presidents dating back to Franklin Roosevelt have increasingly adopted what has been characterized as the ‘‘administrative presidency strategy’’119 or the ‘‘institutional presidency.’’120 This strategy, which seeks bureaucratic compliance with administration goals, has gradually replaced an alternative approach of relying on the bureaucracy to provide neutral information about policy alternatives.121 The hallmarks of the administrative presidency are a politicized appointment and removal process, which emphasizes the loyalty of appointees instead of their expertise, and centralization of power in the White House, through structural and budgetary controls.122 The Reagan administration’s emphasis on the appointment process and the use of OMB review of regulations personify this approach.123 Presidents have been attracted to this strategy because, considering the significant impediments that they confront in managing the government, it holds out more promise of making government responsive to their goals.124

117. In other words, ‘‘[w]hether or not the full potential for presidential control is actually achieved, . . . the President is likely to come out significantly ahead of any other branch in harnessing and directing the stream of regulatory policy-making power.’’ Farina, supra note 24, at 510.
118. Mashaw, supra note 21, manuscript at 35.
122. Moe, supra note 120, at 141.
123. See Robert F. Durant, The Administrative Presidency Revisited: Public Lands, the BLM, and the Reagan Revolution 4 (1992) (“Upon assuming the presidency, Ronald Reagan relentlessly applied an administrative strategy to the pursuit of his policy goals in a fashion and to an extent unprecedented in terms of its strategic significance, scope, and philosophical zeal. . . . Reagan’s strategy was the epitome of Nathan’s administrative presidency.”); supra notes 27, 49–50 and accompanying text.
124. As Professor Waterman has noted, ‘‘When the public began to demand that Presidents solve all of the country’s problems—from the economy and poverty to the environment and worker safety—a lack of bureaucratic responsiveness became a serious threat to presidential leadership.’’ Waterman, supra note 121, at 9–10. Yet, as Professor Moe has noted, the goal of a responsive bureaucracy could only be accomplished by tools strong enough to overcome significant constraints:
The likely continuation of the administrative presidency strategy will undergird the oversight game. President Clinton, no less than his predecessors, will seek to make the bureaucracy responsive to his goals. Because not all of these goals will be shared by Congress, competition to control regulation is inevitable. Moreover, Congress is likely to resist the President's efforts to control the bureaucracy because of the institutional stake it has in contesting the administrative presidency strategy itself.

2. Positive Political Theory

The conclusion that political and institutional competition between the White House and Congress has caused, and will continue to cause, each branch to escalate its oversight efforts does not jibe with positive political theory (PPT). PPT proposes that the President and Congress will seek to avoid competition over regulatory policy by designing a regulatory process that preserves the policy preferences of the legislative coalition that is responsible for the creation of a regulatory regime. This claim, however, is overstated.

When a bill is under consideration, the President and Congress face the prospect that the implementing agency will adopt policies that are inconsistent with the preferences of the political coalitions that support enactment of the law. This

[T]he expectations surrounding presidential performance far outstrip the institutional capacity of Presidents to perform. This gives Presidents a strong incentive to enhance their capacity by initiating reforms and making adjustments in the administrative apparatus surrounding them—but here too there is a fundamental imbalance: the resources for acting upon this strong incentive are wholly inadequate, constrained by political and bureaucratic opposition, institutional inertia, inadequate knowledge, and time pressures. It is this imbalance that channels presidential effort into areas of greatest flexibility and generates the major institutional developments we observe, politicization and centralization.

Moe, supra note 120, at 156.

125. Joel D. Aberbach & Bert A. Rockman, Mandates or Mandarins? Control and Discretion in the Modern Administrative State, 48 PUB. ADMIN. REV. 606, 611 (1988) ("The trouble with the administrative strategy...is that it tends to induce retaliatory behavior...Congress will retaliate when it has the political will.").

126. Besides ideological disagreements, members of Congress are likely to disagree with White House goals because they have different constituencies and different time perspectives. Roger H. Davidson, The Presidency and Congress, in The Presidency and the Political System 363, 365-67 (Michael Nelson ed., 1984).

127. Professor Waterman explains:

The various presidential techniques for centralizing control over the bureaucracy (such as presidential powers of appointment, reorganization, and the budget) are shared with Congress or limited by statute (such as the president's removal authority). As a result, presidential attempts to coerce the bureaucracy can only involve the president in protracted struggles with Congress.

WATERMAN, supra note 121, at 2.

128. "Positive political theory" encompasses "non-normative, rational choice theories of political institutions." Daniel A. Farber & Phillip P. Frickey, Positive Political Theory in the Nineties, 80 GEO. L.J. 457, 462 (1992). As Jerry Mashaw notes, however, because the nature of PPT analysis varies widely, the "familial relationship" of PPT work is "difficult to capture in a core presumption that political behavior is to be explained as the outcome of rational (and often strategic) actions by relevantly situated individuals within some set of defined institutional boundaries." Jerry Mashaw, Explaining Administrative Process: Normative, Positive, and Critical Stories of Legal Development, 6 J. L. ECON. & ORGANIZATION 267, 280 (1990) (Special Issue).
prospect exists because of "bureaucratic drift," which occurs when administrators find it in their self-interest to ignore the coalition's policy preference, or "coalition drift," which occurs when the Senate, the House, or the President successfully pressures an agency to adopt a policy inconsistent with the coalition's preferences. The President and the two branches of Congress seek to minimize such drift for two reasons. First, the degree of electoral support that these parties can obtain from the coalition is conditional "on what it is they can deliver and on how long-lived it is." 129 Second, reducing drift minimizes the oversight game. Because this is a negative-sum game, the parties ex ante dislike the uncertainty it creates, view their competition as wasteful, and wish to prevent an agency from having the power to extract favors in return for favoring a specific policy preference. 130

PPT suggests that the degree of drift can be minimized by designing an agency's structure and procedures to favor the policy preferences of the enacting coalition. This "stacking of the deck" can be accomplished by increasing the opportunity for friendly interest groups (or decreasing the opportunity for unfriendly groups) to bring political pressure on the agency, 131 to participate in agency decisionmaking, and to seek judicial review. 132

This intriguing account of how to organize administrative procedure and political oversight is overdetermined. The vigorous oversight game between the two branches during the last twelve years suggests the President and Congress have largely failed to arrange administrative structures and procedures to preserve legislative bargains. The lack of "stacking the deck" is also suggested by the fact that there is a fairly uniform pattern of administrative procedures used by agencies. 133


130. Structure and Process, supra note 16, at 439-40. These analyses explain:

First, if political actors are risk averse, all three [e.g., the House, Senate, and President] will prefer greater certainty in policy implementation as compared to random noncompliance (that is, noncompliance that may drift away from the preferred outcome of each of the three). . . . Nonetheless, all have an ex post incentive to spend resources persuading the agency to sway policy their way. This is a negative-sum game, so ex ante all three actors regard such expenditures as wasteful. Third, none of the parties wants to let the agency choose which political actor to favor. The power to choose is the power to manipulate, hold up, and extract. Politicians would not willingly subject themselves to such behavior by the agency.

131. By varying the structure of an agency, for example, multiple member commission versus single administrator, or regulation of a single industry versus regulation of multiple industries, Congress can control the ability of outside interest groups to exert political pressure on the agency and the incentive of new interest groups to form to protect the agency's actions. Jonathan R. Macey, Organizational Design and the Political Control of Administrative Agencies, 8 J.L. ECON. & ORGANIZATION 93, 101-02 (1992). Procedures can also be used to protect the original legislative bargain by introducing delay. Structure and Process, supra note 16, at 443. "Although costly to all, delay enables politicians to act to prevent deviations while the coalitional agreement is still the status quo." Id.


133. Glen O. Robinson, Commentary on "Administrative Arrangements and the Political Control of Agencies": Political Uses of Structure and Process, 75 Va. L. Rev. 483, 489 (1989). The theory also does not account for the fact that the goal of the Administrative Procedure Act (APA) is to establish "uniform" procedures. Id.
The failure of the President and Congress to arrange a more harmonious result can be attributed to two factors. First, "if a coalition is able to secure [substantive] legislation only by finessing policy choices," then it is problematic at best for the coalition to control the agency’s policy choices through some structural or procedural method. Indeed, what variation exists might be better explained by the weakness of the enacting coalition. Terry Moe observes that many structural (procedural) features of a bill are traded (demanded) for policy features in a way that “public agencies will tend to be structured in part by their enemies—who want them to fail.” In addition, the argument that Congress and the President seek to reduce policy drift is flawed. A political actor will seek to reduce such drift only if the benefits of taking this action are greater than the benefits of permitting drift. Legislators and the White House can benefit from policy drift to the extent that they can pressure an agency to accept a policy favored by their constituents. Indeed, because the White House has a comparative advantage in influencing agency policymaking, the Reagan and Bush administrations had an incentive not to agree to “stack the deck” in favor of outcomes favored by the coalitions that enacted new regulatory laws. The White House’s position preserved its influence over the implementation of regulatory policy, and permitted it to favor policies of its business constituents.

III. Impact of the Oversight Game

The oversight game is likely to continue; therefore, it is important to evaluate its consequences for regulatory policy. Such an evaluation, however, runs into an immediate problem. If the normative yardstick is whether oversight produces or retards regulation, judgments become bogged down in the broader debate over

134. Id. at 485.
135. Terry M. Moe, Political Institutions: The Neglected Side of the Story, 6 J.L. Econ. & Organization 213, 230 (1990). A good example is the split-enforcement arrangement used by the Occupational Safety and Health Administration (OSHA). See McGarity & Shapiro, supra note 90, at 244-45.
136. See R. DOUGLAS ARNOLD, THE LOGIC OF CONGRESSIONAL ACTION 7 (1990) (“When legislators have to make a decision they first ask which alternative contributes more to their chances for reelection.”).
137. See Morris P. Fiorina, Congress: Keystone of the Washington Establishment (1977), which states

The nature of the Washington system is now quite clear. Congressmen (typically the majority Democrats) earn electoral credits by establishing various federal programs (the minority Republicans typically earn credits by fighting the good fight). The legislation is drafted in very general terms, so some agency, existing or newly established, must translate a vague policy mandate into a functioning program, a process that necessitates the promulgation of numerous rules and regulations and, incidentally, the trampling of numerous toes. At the next stage, aggrieved and/or hopeful constituents petition their congressman to intervene in the complex (or at least obscure) decision processes of the bureaucracy. The cycle closes when the congressman lends a sympathetic ear, piously denounces the evils of bureaucracy, intervenes in the latter’s decisions, and rides a grateful electorate to ever more impressive electoral showings. Congressmen take credit coming and going. They are the alpha and the omega.

Id. at 48.
138. See infra note 160 and accompanying text (actions of the Competitiveness Council).
the value of regulation. Given the complexity of measuring whether regulation is beneficial, this approach can easily slide into outcome-determinative ideological conclusions. In recognition of this difficulty, this section evaluates oversight according to two process values—democratic accountability and comparative expertise and experience—and defends why these values are appropriate yardsticks. Subsequent sections explain that when measured against these values, regulatory policy has deteriorated.

A. Process Values

An economically rational principal would continue oversight as long as the marginal benefit of additional oversight (in terms of reducing agency losses) exceeded its marginal costs. Measuring the costs and benefits of political oversight, however, tends to be outcome-determinative. If one subscribes to the viewpoint that there is underregulation, oversight that weakens or delays regulation is “irrational.” Alternatively, if one subscribes to the view that there is overregulation, oversight that weakens or delays regulation is “rational.”

Another approach is to refer to the “delegation dilemma” discussed earlier. Although it is rational for principals to delegate decisionmaking to an agent when the agent’s experience and expertise can produce collective gains, principals must ensure the agent’s loyalty if these gains are to materialize. Political oversight serves this purpose, but only if two objectives are met. First, elected officials who supervise administrative agents must themselves be accountable to the electorate. Unless this condition is met, one agency problem—voters’ lack of control over elected officials—replaces another—the elected official’s lack of control over bureaucrats. Second, oversight by generalists is more likely to improve the rationality of regulatory policy when it supplies the general preferences or values that an agency should follow. In other words, overseers are unlikely to improve the regulatory process when they engage in micromanagement.

The presidential and legislative oversight employed in the last two administrations was inconsistent with these two conditions. Both branches, but particularly the White House, operated behind a veil of secrecy that created the appearance, if not the reality, that elected officials were engaged in special-interest politics. Moreover, both the White House and Congress have engaged in micromanagement that not only dissipated the gains to be made from collective action, but also fed voters’ cynicism about special-interest politics and the ineffectiveness of government.

139. Kiewiet & McCubbins, supra note 10, at 35.
141. See, e.g., S.J. Plager, Comment, Agency Diplomacy: Relations with Congress and the White House, and Ethics in the Administrative Process, 4 Admin. L. J. 5 (1990) (supporting presidential oversight as a useful antidote to overregulation).
142. Of course, the overseers can seek to develop comparable expertise and experience to that of an agency, but this approach increases the resources devoted to producing regulatory policy, and decreases the collective gains available to citizens. Moreover, the development of the necessary expertise and experience will entail reliance on bureaucrats, which will present its own agency problem.
B. Accountability

Positive political theory teaches that voters are rationally unaware of the outcome of regulatory decisionmaking. In a world where obtaining and acting on information is costly, individual voters ordinarily do not have a sufficient interest in regulatory issues to justify monitoring governmental decisionmaking, let alone to attempt to influence it. If voters lack an incentive to observe the behavior of their agents, elected officials have no incentive to conform to the voters' policy preferences.\textsuperscript{143} Instead, the agents will exploit their "slack," or freedom from observation, to participate in what William Grieder calls the "Grand Bazaar"\textsuperscript{144}—an effort to obtain electoral support from the relatively small groups, which have a sufficient stake in regulatory decisions to lobby for them.\textsuperscript{145}

Two aspects of the political system leaven this rather bleak picture. Despite slack, political actors may adopt policies designed to further their own conception of the public good because of the ideological rewards that this other-regarding behavior creates.\textsuperscript{146} Additionally, certain features of the political system reduce slack and increase public accountability, particularly political competition and the news media. If agents perceive that their self-interested actions may be reported to the voters by political opponents or the news media, they are less likely to favor the policy preferences of special interests.\textsuperscript{147} The possibility of disclosure, however, also gives agents an incentive to keep their actions secret.

The proceeding theory would predict that when elected officials engage in oversight, they will exploit their slack to favor special interests capable of offering electoral support, and that they will employ secrecy to frustrate revelations of their behavior. In fact, both presidential and legislative oversight do follow this pattern, but the lack of accountability is greater in the White House. Because Congress is a more open environment, slack-reducing mechanisms have more of an opportunity to operate.

1. White House Accountability

White House oversight operated in complete secrecy for the first five years of the Reagan administration except for leaks or information disclosed by legislative oversight. OMB adopted some disclosure procedures in 1986 to head off an appropriations rider that would have eliminated its funding for regulatory oversight.\textsuperscript{148}

\textsuperscript{143} Dennis C. Mueller, Public Choice II 205-06 (1989).
\textsuperscript{146} Id. at 179-80.
\textsuperscript{147} Id. at 186-91.
\textsuperscript{148} After the House voted in 1985 to cut off funds for OIRA, the Reagan administration threatened a veto and, if necessary, to move its oversight to a cabinet department. OMB officials then negotiated with their legislative overseers to maintain OIRA funding and in return OMB agreed to legislation that made the appointment of the OIRA administrator subject to Senate approval. At the same time, OIRA instituted disclosure procedures. NAPA REPORT, supra note 78, at 7; Foreman, supra note 105, at 136.
The new procedures revealed some intergovernmental communications—such as draft regulations submitted by an agency—and written conduit communications—that is, information from private parties that is transmitted through OMB to an agency. These disclosure procedures, however, contained generous loopholes. First, because they applied only to OIRA, the procedures were easily avoided by moving oversight to other offices in OMB, or to the Competitiveness Council in the Bush administration. Second, except for EPA, written conduit communications were disclosed only if an agency requested disclosure, and conduit oral communications were not disclosed at all. Third, OMB was also under no obligation to disclose oral intergovernmental communications. Fourth, the public could not find out whether any changes made by an agency during executive oversight were at the White House’s behest. Finally, OMB refused to disclose how long individual regulations were under review, thereby making it difficult to determine whether oversight was used to delay, or at least had the effect of delaying, important regulations.

Congress became increasingly frustrated with the secret nature of presidential oversight during the Bush administration, but the White House was able to block legislative attempts to plug the loopholes. The White House refused to fill the position of director of OIRA for four years, which had the effect of blocking the Senate’s attempts to use the nomination process as leverage to obtain conces-

149. Specifically, OIRA agreed to make available the draft rules submitted by agencies under Executive Order 12,291, written correspondence between it and an agency concerning those rules, and draft submissions for the Regulatory Calendar. Memorandum from OMB to the Heads of Departments and Agencies subject to Executive Order Nos. 12,291 and 12,498 (June 13, 1986), reprinted in OMB, Regulatory Program of the United States, Apr. 1, 1990-Mar. 31, 1991, app. III at 606 (Additional Procedures Concerning OIRA Reviews Under Executive Order Nos. 12,291 & 12,498 [Revised]) [hereinafter Additional Procedures Concerning OIRA Reviews]. The procedure specifies that after publication in the Federal Register, OIRA will furnish upon request any draft of a Notice of Proposed Rulemaking (NPRM), an Advanced Notice of Proposed Rulemaking (ANPRM), or a final rule furnished to it for review under Executive Order 12,291. Id.

150. The procedures require OIRA to send EPA copies of all written material received from persons outside of the government, to advise EPA of all oral communications with such persons, and to invite the EPA to all scheduled meetings with such persons. Additional Procedures Concerning OIRA Reviews, supra note 149, at 606. OIRA also agreed to apply the previous procedures to any agency that requested it. Id.


152. Anecdotal accounts of controversial rules suggest that they may be significantly delayed during the oversight process. See, e.g., McGarity & Shapiro, supra note 90, at 159–61 (OIRA review of OSHA’s formaldehyde rule requires ten months without making significant changes). OMB published aggregate statistics concerning the elapsed time of review, but these did not reveal whether individual rules are subject to undue delay. See, e.g., OMB, Regulatory Program of the United States Government, Apr. 1, 1990–Mar. 31, 1991, at 647.

sions. In 1989, a House committee did obtain an agreement with OMB concerning additional disclosure, but the White House disowned it. Finally, the Senate Committee on Government Affairs approved the Regulatory Review Sunshine Act of 1991 in the spring of 1992, but the threat of a White House veto apparently prevented further action.

The Bush administration opposed additional disclosure on the grounds that it would violate "executive privilege." Whatever the merits of this claim—and it is disputed later in this article—it cannot be contested that the President obtains a significant political advantage over Congress from secret oversight. When the White House presents Congress with a policy fait accompli, it makes it less likely that Congress can intervene to change the President's policy preference. Moreover, secrecy slows the reduction of the President's slack by political competition or by the news media, and therefore enables the White House to use oversight to favor its political constituents.

2. Congressional Accountability

Congressional oversight is a blend of public and nonpublic activities. Although hearings and reports are public, legislators also conduct private conversations with regulators. The behavior of the "Keating Five" is ample evidence that legislators have used such private contacts to protect campaign donors from regulators. Although such behavior presents an accountability problem, the situation at the White House is different from that in Congress. As a general rule, legislators lack the leverage that the White House can employ to stop or alter proposed regulations. Moreover, to the extent there is political competition over an issue within Congress, an agency will be lobbied by legislators with different policy perspectives. Finally, maintaining secrecy in an institution as large as Congress is more difficult than at the White House where far fewer persons are involved in oversight.

157. See infra note 196 and accompanying text.
158. See infra notes 197-99 and accompanying text.
159. See supra notes 61-65 and accompanying text.
160. See Olsen, supra note 79, at 57. ("Evidence indicates . . . that industry interests spend a disproportionate amount of time meeting with and passing documents on to OMB, as compared with public interest groups or consumers.").
161. See supra note 59.
162. Grieder, supra note 144, at 27.
163. See supra notes 100-101 and accompanying text. In the case of the Keating Five, the Senators were successful for a time because regulators also had an interest in covering up problems in the savings and loan industry. Grieder, supra note 144, at 70.
C. Micromanagement

Besides a lack of accountability, the oversight game has produced a second dysfunction. In its competition to control regulatory policy, each branch has adopted micromanagement techniques that have reduced the collective gains available from relying on agency expertise and experience. White House overseers have interjected themselves into the details of regulatory proposals that are more properly left to agency technical and scientific experts. Congress has saddled agencies, particularly EPA, with statutory deadlines and more definitive legislative mandates.

1. White House Micromanagement

Presidential overseers have had little or no scientific or technical expertise; they have been, for the most part, economists, often with only a few years of experience. 164 Nevertheless, White House oversight is said to improve the quality of regulation because it provides a broad and general perspective that counteracts the more narrow perspective of the experts in the agencies. 165 If this had been the OMB's role, regulatory policy might have been improved, but OMB failed to provide a generalist perspective for two reasons. First, it was not selective in what was reviewed. Because overseers tended to look at everything, rather than focus on what was important, they often missed important issues, and ended up fighting with the agency over unimportant details. 166 This tendency resulted from the overseers' lack of expertise and experience and from their distrust of the agencies they were reviewing. 167 Second, the administration's ideological beliefs usually prevailed over an agency's policy analysis. While "[t]here are literally hundreds of cases of OMB intervention into agency rulemakings to urge less stringent regulations," there are "[t]he number of cases of OMB urging the agencies to regulate more stringently." 168 Indeed, in OMB "[t]here was a strong sense among most agency analysts that a good analysis will not save a decision with which OMB disagrees and a poor analysis will not slow down a decision with which OMB agrees." 169

Although anecdotal evidence establishes the existence of such problems, 170 the extent is difficult to determine because of the secrecy surrounding presidential oversight. Yet, the strong suspicion remains—fueled by the fact that OMB sought to weaken almost every regulation that it reviewed—that presidential overseers were up to something more than asking hard questions for the sake of producing better policy.

164. Williams, supra note 27, at 4-8; see generally Morrison, supra note 91, at 1066 (OMB analysts lack technical expertise); Percival, supra note 87, at 182 ("Serious questions about OIRA's competence to handle complex scientific issues have been raised as a result of one of the few instances when OIRA's substantive views on regulatory policy have been articulated publicly.").
165. DeMuth & Ginsburg, supra note 31, at 1083-84; Strauss & Sunstein, supra note 3, at 191.
166. NAPA REPORT, supra note 78, at 39; Olsen, supra note 79, at 48.
168. McGarity, supra note 82, at 286-87.
169. Id. at 286; see also Percival, supra note 87, at 187-89.
170. E.g., McGarity & Shapiro, supra note 90, at 232 (describing OMB interference with OSHA).
2. Congressional Micromanagement

Congress has also been significantly involved in micromanagement. Congressional committees share with OMB the tendency to focus on specific details and ignore the large policy picture. In addition, Congress’s frustration with the pace of rulemaking has led it to impose rulemaking deadlines, particularly for EPA, and to pass detailed legislation, again particularly for EPA. These responses are understandable in light of the competition between the branches over regulatory policy, but they are a mixed blessing in terms of improving regulatory policy.

A leading study of oversight of social regulation concludes that the oversight has been “invariably weak” at strengthening health and safety regulation because committees ignore regulatory goals and focus instead on regulatory means. Political incentives dictate the “means-focused” preoccupation. It is not only difficult and complex to conceptualize and focus on ultimate goals, but there is often no payoff because political uncertainty and conflict make it difficult for Congress to agree on what are its ends. By comparison, “[w]ith genuine safety and health impacts but distant blurs on the policy horizon, overseers focus more shortsightedly on immediately placating constituents and policing procedures—a preoccupation with means related only imperfectly, if at all, to policy effectiveness.”

Rulemaking deadlines are a good example of Congress’s unproductive preoccupation with regulatory means. Although such deadlines can improve the policy process, this potential has not been realized. The judiciary’s reluctance to enforce them has weakened their agency-forcing impact. The other beneficial aspects of deadlines have often been lost because Congress has established unrealistic deadlines or more deadlines than an agency could realistically meet. More-

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171. See Shapiro & Glickman, supra note 98, at 829–30 (describing increased use of legislative deadlines); Craig N. Oren, Detail and Delegation: A Study in Statutory Specificity, 15 COLUM. J. ENVTL. L. 143, 145 (1990) (describing increased use of more specific legislation).

172. Foreman, supra note 42, at 8–9, 143.

173. Id. at 9, 146.

174. Id. at 9.


176. Deadlines establish priorities for an agency to follow, focus legislative oversight on agency performance, mitigate political pressures on an agency to act slowly (or not at all), and give statutory beneficiaries a tool by which they can hold agencies accountable for failure to act. Sidney A. Shapiro & Thomas O. McGarity, Reenvisioning OSHA: Regulatory Alternatives and Legislative Reform, 6 YALE J. ON REG. 1, 53 (1989); Applegate, supra note 175, at 331.

177. Shapiro & Glickman, supra note 98, at 834–35; Shapiro & McGarity, supra note 176, at 54.

178. When Congress establishes inappropriate deadlines, or too many deadlines, agencies choose one of two unattractive options. Either they act hastily, which increases the risk that regulations would be overturned in court because the agency has inadequate evidentiary support, or they miss deadlines, which forces them to divert resources into deadline litigation and away from more worthwhile substantive projects. Shapiro & McGarity, supra note 176, at 53–54; Shapiro & Glickman, supra note 98, at 835–36; Applegate, supra note 175, at 331.
over, because Congress has responded to missed deadlines with more deadlines, which have also gone unmet, public cynicism about the ability of government to regulate has increased.179

Although deadlines are easier to pass than substantive legislation, Congress has also enacted specific, detailed legislation, such as the recent Clean Air Act amendments.180 From a democratic perspective, it is difficult to carp about Congress making regulatory policy, but such micromanagement has a downside, which is to deny EPA the flexibility it needs to implement complicated regulatory regimes.181 When EPA is stymied by legislative prescription, Congress often responds with the wrong medicine by passing still more detailed legislation.182

Congress should not entirely avoid these forms of micromanagement. Except for the agency-forcing aspects of legislative deadlines, for example, statutory beneficiaries would have had no legal recourse to hold some agencies accountable for their inaction in the Reagan and Bush administrations.183 Yet, this analysis does support the conclusion there will be collective gains if agencies are given greater flexibility and discretion. Thus, forms of oversight that hold agencies accountable without micromanagement have the potential to produce better regulatory policy.

179. Shapiro & Glicksman, supra note 98, at 836 n.81. Former EPA administrator William Ruckelshaus explains that unrealistically short deadlines "undermine[] confidence in EPA managers, cause[] the public to measure them against unrealistic goals, and to think we've failed and obscure the successes we've made. Deadlines reinforce the sense that we (EPA) are not getting anywhere, to the detriment of the public sense of confidence in government." Id. (quoting ENVIRONMENTAL & ENERGY STUDY INST. & ENVT'L. LAW INST., STATUTORY DEADLINES IN ENVIRONMENTAL LEGISLATION: NECESSARY BUT NEED IMPROVEMENT 48 (1985)).


181. Professor Lazarus explains:

While legislative prescription had some advantages (for example, it increased congressional accountability), they came at the expense of the kind of flexibility EPA needed to respond to the uncertain contours of environmental problems. . . . The implementation of environmental standards has necessarily required substantial groping in the dark because policymakers have chosen not to risk environmental quality and human health by waiting for the elusive notion of scientific certainty. Statutory prescription therefore is an especially risky endeavor. It can lead to wasteful expenditures for pollution control and, by way of missed opportunity, to more, rather than less, environmental degradation.

Lazarus, supra note 73, at 228-29 (footnotes omitted). Professor Oren has shown how detailed legislation concerning the Prevention of Significant Deterioration Program (PSD) under the Clean Air Act produced inadvertent errors that hampered implementation, robbed EPA of flexibility to respond to the realities of day-to-day administration, and placed the judiciary in the position of having more influence over EPA policy. When these problems cause an agency to fumble its implementation, Congress responds with the wrong medicine by passing still more detailed legislation. Oren, supra note 171, at 240. Professor Oren is convinced by EPA’s experience that “legislative detail, either alone or in combination with interstitial flexibility is not a satisfactory means of formulating and implementing environmental policy.” Id. at 239; see also Michael Herz, Judicial Textualism Meets Congressional Micromanagement: A Potential Collision in Clear Air Interpretation, 16 HARV. ENVTL. L. REV. 175 (1992) (discussing how legislative micromanagement creates errors that are difficult to correct).

182. Oren, supra note 171, at 240.

183. See, e.g., Shapiro & McGarity, supra note 176, at 56 (noting how beneficiary groups relied on deadlines to force OSHA to regulate).
IV. New Rules for the Oversight Game

The evolution of political oversight has reduced the extent to which elected officials are held accountable for regulatory decisions and has dissipated collective gains that agency experience and expertise can generate. This section discusses how oversight mechanisms might be reformed to respond to these dysfunctions. The analysis is based on three premises. First, reform must recognize and build upon the President’s comparative oversight advantage. Although Congress has extended its efforts by adding police patrol to fire alarm oversight, it can not overcome the constitutional and institutional factors that make the White House’s oversight more effective. Second, reform must make those responsible for oversight more accountable. This step not only reduces the voters’ agency losses, but it is essential to convince Congress to accept the legitimacy of the White House’s efforts, and vice-versa. Finally, reform that creates a dialog between the White House and Congress concerning regulatory policy can reduce the negative-sum nature of the oversight game.

This section recommends three steps that build on the previous premises. First, the Administrative Procedure Act\textsuperscript{184} should be amended to establish disclosure requirements for both presidential and legislative oversight. Second, the focus of presidential and legislative oversight should be shifted away from micromanagement. Finally, the President and Congress should engage in joint oversight based upon a regulatory agenda.

A. Disclosure Requirements

This section describes disclosure procedures that would increase the accountability of individuals involved in oversight, analyzes the impact of oversight mechanisms, and explains why the mechanisms are consistent with constitutional limitations. Three types of disclosures are considered: conduit communications, written justifications, and statistical information.

1. Conduit Communications

Both the Administrative Conference of the United States (ACUS)\textsuperscript{185} and the American Bar Association (ABA)\textsuperscript{186} have warned that presidential oversight should not be a conduit for unrecorded conversations from private parties to agency officials. Conduit communications are unfair to other participants in a rulemaking proceeding, put the agency in jeopardy of relying on unreliable information,\textsuperscript{187} and increase the public’s perception, if not the reality, that rulemaking agencies are captured by special interests. When private parties utilize the legislature to


\textsuperscript{187} McGarity, supra note 91, at 458.
transfer nonpublic information and arguments to agencies, the same problems exist. The same disclosure rules should therefore apply to both branches.

Requiring overseers to disclose written conduit communications, as well as a summary of oral communications, is the most effective way to police these communications. This requirement should not adversely affect the oversight capacities of either branch because communications between governmental officials are not revealed. Moreover, disclosure of written communications should not be unduly burdensome. Mandating that overseers prepare written summaries of oral communications, however, is a more imposing burden. An alternative is to require that overseers maintain and disclose a log identifying the time and place of oral conduit communications. While this more limited proposal establishes a paper trail of the occurrence of oral conduit communications, it prevents interested persons from responding to the conduit information. Moreover, once there is a requirement that written conduit communications be disclosed, there would be an incentive to use oral communications for conduit purposes unless a summary of them is also disclosed. These two considerations tip the balance in favor of requiring a written summary of oral communications despite the burden this requirement imposes.

2. Written Justifications

In addition to the issue of conduit communications, oversight practices present another problem. Under current norms of administrative procedure, an agency must disclose its basis for proposing and adopting a regulation. When the White House secretly intervenes to dictate a policy outcome, an agency may manipulate how it responds to these norms rather than disclosing presidential involvement. When such obfuscation occurs, the White House's policy reasons for acting are hidden from the news media and protected from the effects of political competition. A requirement that the White House issue a written justification for returning a proposed or final rule to an agency for reconsideration would help establish the missing accountability.

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188. The fact that OIRA has operated under a rule requiring the disclosure of written conduit communications suggests the feasibility of this requirement. See supra note 150 and accompanying text. Moreover, the Administrative Conference has recommended the disclosure of written conduit communications received by OMB. ACUS Recommendation 88-9, supra note 185.

189. This is the recommendation of the Administrative Conference. ACUS Recommendation 88-9, supra note 185.

190. See supra note 146 and accompanying text (disclosure fosters political competition and media coverage).


193. This reform would not require the disclosure of what actually transpired since it would not reveal the actual communications between the White House and an agency. Thus, the White House could dictate a policy result for one reason, and justify its actions based on another reason. Revelation of intergovernmental communications would be likely to violate the President's executive privilege, however. See infra note 196 and accompanying text. In addition, this reform would have a prophylactic effect. Speaking of OIRA's policy of issuing written policy guidance, Professor Bruff notes that "[t]hose interested can track the written portions of OMB's activity to check its wisdom and legality. Knowing that this [paper] trail is being left, those within OIRA and the agencies can be expected to ensure that their interchange is within legal limits." Bruff, supra note 57, at 586.
A written policy justification, however, has two limitations. It would not be applicable in any case where a draft regulation was not formally returned to the agency for reconsideration, and it would not apply to secret legislative oversight.194 These problems can be mitigated by requiring an agency to identify and explain in its rulemaking notice any significant changes made to a rule as a consequence of either presidential or legislative oversight.195

Although additional disclosure would increase accountability, the Bush administration opposed reform as a violation of the President’s executive privilege. The White House opposed any disclosure that might chill intergovernmental deliberations on the grounds that there is no benefit to such disclosures. It argued that interested parties are not entitled to know anything about executive oversight because the agency’s decisions have no official status until the oversight process is completed and a proposed or final regulation is issued.196 In other words, the White House asserted the concept of a “unitary executive branch” in which preliminary agency decisions have no public significance.

This unitary executive viewpoint, however, does not reflect either current institutional arrangements or separation of powers principles. Congress has delegated decisionmaking authority to agencies, not to the President, permitting agency administrators to ignore the President’s directives (at least until they are replaced, if they can be replaced for a policy disagreement). Moreover, the Supreme Court has sanctioned these institutional arrangements unless they unduly constrain the President’s ability to carry out core executive functions.197 As Professor Strauss has forcefully demonstrated, this “core function” test is preferable to a formalistic approach that draws rigid lines around the constitutional interests of each branch.198 To the extent that the Court has spoken about Congress’s authority to compel disclosure of White House information, it has adopted a functional balancing test, which compares the benefits and detriments of such disclosure.199

The reforms recommended here pass constitutional muster because they constitute a minimal intrusion on predecisional intergovernmental communications. Actual conversations between agency administrators and elected officials (and between their respective staff members) are still protected. The procedures require

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194. Legislators (or their staffs), however, are less often in a position to dictate a policy outcome, such as when the White House returns a rule to an agency for reconsideration. See supra text accompanying note 112.

195. See Gilhooley, supra note 91, at 320–21 (favoring agency explanations for presidential oversight).

196. E.g., Letter from James B. MacRae, Jr., Acting Administrator and Deputy Administrator, Office of Information and Regulatory Affairs, to Thomas M. Susman, Chairman, ABA Section of Administrative Law and Regulatory Practice 6-7 (Jan. 17, 1992) (on file with author) (“[B]y requiring the disclosure of predecisional, deliberative communications, the recommendation abandons the well-established protections afforded by the deliberative privilege.”).


only that both the White House and an agency defend their decisions in terms of the agency's legal mandate. In other words, the reforms do not intrude on the deliberative privilege any more than the requirement that agencies issue a concise statement of basis and purpose to justify a rule constitutes a revealing of communications between an administrator and that person's subordinates. 200

3. Statistical Information

One more aspect of secret oversight requires attention. The refusal of the White House to reveal how long individual regulations have been under review prevents the public from assessing the White House's contribution to regulatory delay. 201 This problem can be addressed by requiring the President to publish regularly a list of all proposed or final rules that were not approved for publication within ninety days following the agency's submission, the dates that the rules were submitted, and, where applicable, the dates that the rules were approved.

Any determination whether the benefits of executive oversight are greater than its costs requires accurate data concerning the extent of any delay. This recommendation makes such data public. Moreover, a regular publication requirement should not cause an undue burden on executive oversight bodies. Finally, the reform does not interfere with the supervisory function of executive oversight because it does not require disclosure of any intragovernmental communications. 202

B. Avoidance of Micromanagement

New disclosure procedures will increase the level of accountability of political oversight by empowering the news media and political opponents to monitor presidential and legislative actions to a greater extent. The nature of oversight must also be changed to capture the collective gains obtainable from agency expertise and experience. The White House should emphasize agenda-setting and coordination. Where Congress finds agency discretion to be inappropriate, it should emphasize agency-set deadlines and legislative hammers.

1. White House Reorientation

White House oversight can potentially serve three functions: agenda-setting, coordination, and review of individual regulations. In the last two administrations, rule review was emphasized, coordination was given some attention, and agenda-setting was almost ignored. A better approach would reverse these priorities. Presidential oversight should have as its first priority the establishment of a regula-

201. See supra note 152 and accompanying text.
202. In Wolfe v. Department of Health and Human Servs., 839 F.2d 768 (D.C. Cir. 1988) (en banc), the court held that the FOIA did not require the Department of Health and Human Services to disclose agency logs which indicated when proposed and final rules were submitted to OMB for review. The court justified this conclusion on the basis that, armed with such information, interested persons would lobby OMB and disrupt the process of deliberation. Id. at 776. The proposed reform avoids this problem, if it is a problem, because it only requires disclosure on some regular basis, such as each year.
tory agenda, as its second priority the coordination of regulation, and as its last priority the review of individual regulations.

The Reagan administration took a step in the direction of agenda-setting when it required agencies to submit an annual regulatory agenda to OMB, and the Bush administration continued this requirement. This action fell short of setting an agenda in two ways, however. Because of staffing limitations, OMB apparently gave only cursory review to each agency’s plans. Also, OMB’s review was ad hoc because neither administration established a set of goals or principles to guide the process. If the White House more closely supervises the regulatory agenda of agencies, it can shape the direction of regulatory policy across the government, as well as in individual agencies. It can also reconcile regulatory objectives with the President’s goals in other areas such as economic development and foreign trade. Close supervision of regulatory agendas would also permit the President to seek appropriate legislative changes to obligations that are inconsistent with White House objectives.

The President should also emphasize the coordination of regulatory policy between agencies. Only the White House is in a position to identify and reduce conflicts between agencies that regulate in the same or similar areas or otherwise have the potential of establishing conflicting regulatory policies. Although the last two administrations engaged in some coordination, the White House should expand this effort by establishing “minicabinets” responsible for establishing a coherent approach to different policy areas. When used in conjunction with agenda-setting, this approach offers the President a realistic opportunity to reduce agency losses without engaging in counterproductive micromanagement.

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203. See supra notes 51–52 and accompanying text.
204. See supra note 57 and accompanying text.
205. Since both the Reagan and Bush administrations were often suspicious of the value of government regulation, it is hardly surprising that they did not attempt to establish a government-wide framework for how regulation should proceed. Such a framework would be valuable even if it established principles to limit the types and kinds of regulation.
206. See, e.g., William D. Ruckelshaus, Who Will Regulate the Regulators?, N.Y. Times, Feb. 3, 1993, at A23 (“President Clinton needs to create a White House oversight and review mechanism that allows him to coordinate environmental, health and safety regulations with his economic policies, particularly since his main concern is economic rebuilding.”); Bruce A. Silverglade, Tapping Into FTC’s Strength, Legal Times, Nov. 16, 1992, at 24 (proposing how President Clinton can use the Federal Trade Commission to achieve domestic policy goals that he stressed during the campaign).
207. For further discussion of the importance of presidential coordination, see Strauss & Sunstein, supra note 3, at 189, and Bruff, supra note 57, at 540-46.
208. The White House, for example, coordinated the regulatory approach of several different agencies to biotechnology. Sidney A. Shapiro, Biotechnology and the Design of Regulation, 17 Ecology L.Q. 1, 13 (1990).
209. Douglas Yates, Bureaucratic Democracy: The Search For Democracy And Efficiency In American Government 192 (1982) (“Since presidential assistants (and long-range planners) would be involved in the minicabinets . . . this would add a Madisonian checking-and-balancing feature by deliberately opening up bureaucratic policy debate and conflict in the minicabinet[s].”).
210. Professor Yates explains that “[a]t the least, open conflict and open policy debate in the minicabinets would increase competition in bureaucracy and serve the Madisonian value of checking bureaucratic power. More than that, to the extent that minicabinets would prove capable of cooperating and working out shared goals, the administrative quality of bureaucratic governance would be substantially enhanced.” Id.
If the White House controls the general direction of regulatory policy, the function of OIRA review could be reoriented in two ways. First, review could be focused on whether an agency can justify a regulation as consistent with the general policy goals of the administration. This orientation would permit the White House to eliminate some of the burdensome reporting requirements established in the last two administrations.\textsuperscript{211} For example, when the White House approves an agency's regulatory agenda, it could waive the use of cost-benefit analysis in cases where the preliminary data suggests that the test is met or where a cost-benefit test is inconsistent with the agency’s legislative mandate. Second, the regulatory review process could monitor the timeliness of agencies in the performance of their regulatory duties and investigate the reasons for chronic delays.\textsuperscript{212} This function would give the White House the perspective it needs to adjust agency budgets, seek corrective legislation, or obtain other appropriate relief.

2. \textit{Congressional Reorientation}

The White House can reorient its oversight by emphasizing agenda-setting and regulatory coordination. For its part, Congress should improve its oversight capacity by better coordination and by allowing agencies more flexibility. Although previous legislative attempts to monitor regulatory decisionmaking have been constrained in part by a lack of coordination between committees,\textsuperscript{213} Congress has several viable options to improve coordination.\textsuperscript{214} Since micromanagement is a response to the failure of monitoring,\textsuperscript{215} improved coordination should reduce the demand for this approach.

To the extent Congress determines that micromanagement is necessary, it should rely on tools that permit greater agency flexibility. As noted earlier, legislative deadlines have the benefit of holding an agency accountable,\textsuperscript{216} but unless they are tailored so as not to "overstimula[te] the organism,"\textsuperscript{217} they also can be counterproductive.\textsuperscript{218} Rather than setting the deadlines itself, Congress should require an agency to set its own rulemaking deadlines that would be judicially enforceable.\textsuperscript{219}

As an alternative to specific legislative deadlines, Congress can pass substantive "hammers" in appropriate cases. The metaphorically named "hammer" gives an agency a period of time in which it can regulate, and, if at the end of that time the agency has failed to act, the "hammer falls" and a regulatory result prescribed

\textsuperscript{211} For a description of reporting requirements, see supra notes 49-54 and accompanying text.
\textsuperscript{212} Percival, supra note 87, at 201.
\textsuperscript{213} See supra note 69 and accompanying text.
\textsuperscript{214} For suggestions concerning how Congress can better coordinate its monitoring efforts, see Lazarus, supra note 73, at 232-33.
\textsuperscript{215} See supra note 185 and accompanying text.
\textsuperscript{216} See supra note 183 and accompanying text.
\textsuperscript{218} See supra notes 178-79 and accompanying text.
\textsuperscript{219} This approach permits an agency to set realistic deadlines, but it also establishes a performance benchmark for Congress to oversee and for the courts to enforce. Shapiro & McGarity, supra note 176, at 56-57. "Congress could further assure accountability by providing that [agency-set deadlines could be extended only for good cause and only for [legislatively] determined intervals." Id. at 57.
in the legislation goes into effect.\textsuperscript{220} Congress can also establish specific substantive criteria that go into effect unless and until an agency issues regulations changing the legislatively specified standard.\textsuperscript{221} In this latter case, the legislative solution remains in effect until the agency acts.

These innovations address the lack of flexibility when Congress legislates a particular regulatory solution. As in the case of traditional legislation, a hammer ensures that a regulatory solution is implemented. By giving agencies an opportunity to act to override the legislative solution, the hammer also permits agencies to correct erroneous congressional judgments and misplaced legislative emphasis.\textsuperscript{222}

C. J\textsc{oint} O\textsc{versight}

By implementing the proposed reforms, the White House and Congress can avoid micromanagement in regulatory oversight and also reduce agency losses. As long as oversight is a negative-sum game, however, each branch will be reluctant to move unilaterally to less intrusive oversight mechanisms. The disclosure procedures recommended earlier will help establish a climate of trust by exposing more of each branch's activity to the other. This section analyzes how to create additional cooperation. Two strategies are considered: the "regulatory budget" and the "regulatory calendar." The first reform would legislatively establish an upper limit on the costs of regulatory activities and apportion this sum among the individual regulatory agencies. The second reform would legislatively establish the agenda of federal regulatory initiatives. A modified form of the regulatory agenda is proposed as the most appropriate vehicle for joint oversight.

1. The Regulatory Budget

The regulatory budget is an old idea with new life. The concept, which dates back to the Carter administration,\textsuperscript{223} became a perennial reform candidate after Christopher DeMuth argued in 1980 that it would increase political accountability and reduce micromanagement by both branches.\textsuperscript{224} Other analysts, while support-

\textsuperscript{220} Shapiro & Glickman, \textit{supra} note 98, at 839.
\textsuperscript{221} Id.
\textsuperscript{222} Id. at 840.
\textsuperscript{224} DeMuth, \textit{supra} note 223, at 29. DeMuth suggested that the unique problem of regulatory costs—that is, costs imposed on the economy by government regulation—was that they are unconstrained by the political system used to appropriate tax revenues. \textit{Id.} at 30-31. He contended that "[t]he most attractive feature of the regulatory budget is that it would establish a clear upper limit on the government's regulatory activities and clear priorities among its various health, safety, environmental, and economic ventures." \textit{Id.} at 37. DeMuth also argued that with a regulatory budget a good deal of the steam would go out of the current political dispute between the President and Congress over the President's proper role in individual regulatory decisions. The President and Congress would be jointly responsible for establishing systematic bounds on regulatory policy, and both would be less inclined to be drawn into sporadic, unproductive forays over the details of this or that regulatory proceeding. \textit{Id.} at 38.
ive of the concept, have been dubious about its practicality in light of the difficulty of computing costs and of enforcing budget limits. Nevertheless, the concept has received recent political and academic endorsements.

Even if the methodological problems could be solved, which is a dubious proposition, the regulatory budget is not an appropriate vehicle for joint presidential-legislative oversight. Choosing a budget ceiling without consideration of regulatory benefits is incoherent, and attempting to take benefits into account would significantly compound the methodological problems. Moreover, budget estimates, which are inherently imprecise, would invite partisan wrangling because opponents and supporters of regulation would advocate budget levels based on ulterior motives concerning the scope of federal regulation. With such controversy, the regulatory budget could easily bog down, as does the traditional budget process. Finally, the regulatory budget could make elected officials less, not more, accountable. The fact that joint oversight would revolve around empirical data would obscure it from the public and invite manipulation at the behest of special interests.

2. The Regulatory Agenda

Robert Litan and William Nordhaus have recommended a legislated regulatory agenda as a more practical approach to joint oversight. In addition to

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228. See Applegate, supra note 175, at 333 (summarizing the methodological problems). But see Regulatory Program, supra note 226, at 6 (methodological problems "should not be insurmountable").

229. When regulatory benefits exceed regulatory costs, regulation produces a net increase in social welfare. A ceiling on costs set without regard to the level of potential benefits would prevent the country from obtaining increases in social welfare that regulation could have produced. Conservative supporters of the regulatory budget are apparently not worried about such a result because they believe the country is significantly overregulated. See, e.g., DeMuth, supra note 223, at 31-37. This belief, however, lacks empirical support. See Robert W. Hahn & John A. Hird, The Costs and Benefits of Regulation: Review and Synthesis, 8 Yale J. on Reg. 233, 253 (1991) (concluding that the total costs and benefits of social regulation are roughly equated); Sidney A. Shapiro & Thomas O. McGarity, Not So Paradoxical: The Rationale for Technology-Based Regulation, 1991 Duke L.J. 729, 730-36 (disputing studies that establish overregulation by the Occupational Safety and Health Administration).

230. See Shapiro & McGarity, supra note 229, at 731 (explaining that the difficulty in estimating regulatory costs "pale in comparison" with the "exceedingly complex and value-laden issues inherent in estimating or measuring health and environmental regulation's benefits").

231. See Hahn & Hird, supra note 229, at 239-47 (discussing various models used to calculate cost estimates).

232. The same problem would limit the potential of the budget as a device to permit informed comparisons across programs.

233. See supra text accompanying notes 19-20. Professor Sunstein apparently ignores this problem when he concludes that the regulatory budget has "the effect of overcoming the power of well-organized groups to ensure passage of programs that benefit them at the expense of the public as a whole." Sunstein, supra note 227, at 291. Experience also contradicts Sunstein's optimistic assessment. As John Applegate notes: "Congressional handling of such complex items is notorious for inviting the inclusion or deletion of parochial interests. The annual Congressional budget process, for instance, does not inspire confidence." Applegate, supra note 175, at 333 (footnote omitted).

promoting dialogue between the branches, this approach has several other advantages. By involving Congress on a systematic basis, it remedies the often haphazard nature of legislative oversight.235 The proposal is also responsive to the delegation dilemma.236 Because elected officials intervene at the level of making broad allocational decisions, the collective gains that can be obtained when agency officials make specific policy decisions are preserved.237 With an agency’s regulatory agenda approved in advance, fewer occasions might arise when either branch would feel the necessity of mandating a specific policy outcome.238 If priorities are based (at least in part) on preliminary cost-benefit estimates—as Litan and Nordhaus propose239—that this approach is more likely to produce rational priorities than the regulatory budget, which considers only costs. Finally, the process would tie in with the earlier recommendation that the White House should establish its own general regulatory agenda.240 Indeed, Congress should review the White House’s general regulatory goals as part of this process.

Balanced against these advantages are two problems. The process might still be heavily influenced by special interests, although this result is less likely than under a regulatory budget, which, because it involves empirical data to a greater extent, is more obscure to the public.241 More importantly, the regulatory agenda might fall victim to delays in Congress occasioned by political disagreements or the press of other business. In fact, groups opposed to regulation will be able to exploit the inertial elements inherent in the legislative process to delay approval of the agenda, especially in cases where regulated beneficiaries were widely dispersed. Litan and Nordhaus recommend limiting floor amendments as one approach to this problem,242 but whatever solutions are devised, interest groups will likely find strategic ways to avoid them.

The significant possibility of delay could be avoided if Congress held hearings on each agency’s regulatory agenda, but did not adopt it legislatively. This oversight

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235. See supra text accompanying note 69 (discussing random nature of legislative oversight).
236. See supra text accompanying note 18.
237. Litan and Nordhaus note:

A second rationale for delegation is that administrative agencies are believed to have greater expertise in any given regulatory area than Congress. While this is likely to be true as to the fact gathering and evaluation functions involved in regulatory decisions, the existence of such expertise cannot justify the abstention of Congress from the important policy judgments that must be made in issuing regulations. In making these policy judgments, elected officials are better able—and, in a democracy, more suited—to make broad allocational decisions than are agency bureaucrats.

LITAN & NORDHAUS, supra note 225, at 174.


239. LITAN & NORDHAUS, supra note 225, at 160.
240. See supra notes 205–06 and accompanying text.
241. See supra note 233 and accompanying text (empirical nature of regulatory budget will obscure the process from the public).
242. LITAN & NORDHAUS, supra note 225, at 165.
would still give Congress significant influence over the agenda. Moreover, Congress could experiment with this approach, and if it was not effective, it could always move to a legislatively adopted regulatory agenda.

The claim that cooperation could produce some policy consensus between the two branches appears to be inconsistent with an earlier prediction that the two branches are likely to fight over regulatory policy because each has a different institutional perspective and each is answerable to different constituencies. Such factors are not absolute, however, because public policy decisions are also influenced by considerations of what constitutes "good" public policy. Joint oversight could produce dialogue that may influence the White House and Congress to reject special interest pleading and institutional self-interest. Even if this optimism is unwarranted, joint oversight would increase the impact of slack-reducing elements. Because such oversight would focus public attention on regulatory goals, it would highlight self-interested action that can not be defended as consistent with such goals. Such revelations would make it in the self-interest of political actors to reject policies that favored narrow interests.

V. Executive Order 12,866

President Clinton issued Executive Order 12,866, which establishes his regulatory planning and review process, shortly before this article went to press. This section determines that the order should reduce the agency problem at OIRA, decrease secrecy, and lessen micromanagement, but the extent of these benefits depend on how the order is implemented.

A. OIRA Oversight

President Clinton has continued the "administrative presidency strategy" of his predecessors, which utilizes centralized control and other strategies to ensure bureaucratic compliance with administrative goals. Unlike its two immediate

243. Congress could always legislate its preferences for a specific agency if a compromise with the White House could not be arranged. Of course, it would have to overcome a veto if the dispute went that far, but the same would be true of a legislated agenda.

244. See supra notes 125–27 and accompanying text.

245. See Daniel A. Farber & Philip P. Frickey, Law and Public Choice: A Critical Introduction 33 (1991) ("No one would deny the importance of self-interest in the political process, but we can also be reasonably sure that self-interest is not the whole story.").

246. The confidence that rational debate can mediate "different approaches to politics, or different conceptions of the public good, through discussion and dialogue... to produce substantively correct outcomes, understood as such through the ultimate criterion of agreement among political equals" is a fundamental tenet of modern republicanism. Cass R. Sunstein, Beyond The Republican Revival, 97 Yale L.J. 1539, 1554 (1988); see generally The Power of Public Ideas (Robert Reich ed. 1986).

247. See supra note 147 and accompanying text (political competition and news coverage reduce slack and increase public accountability).


249. See supra part II.D.1. For example, President Clinton stressed that the new order was consistent with his administration's philosophy of "reinventing government." Remarks by President Bill Clinton and Vice President Al Gore at Signing of Executive Order on Regulatory Reform, Federal News Service, Sept. 30, 1993, available in LEXIS, Nexis Library, Federal News Service file; see Report of the National Performance Review, Creating a Government That Works Better & Costs Less (1993).
predecessors, however, the White House has recognized that appointing unelected bureaucrats to check other unelected bureaucrats creates its own agency problem.\textsuperscript{250} Under the new Order, OIRA still undertakes regulatory review,\textsuperscript{251} but the Vice President is responsible for the Order's implementation,\textsuperscript{252} which includes oversight of OIRA,\textsuperscript{253} the identification of existing regulations that should be reviewed,\textsuperscript{254} and resolving policy disputes between OIRA and an agency.\textsuperscript{255}  

Because the Vice President is in charge, one commentator has called the Order a "landmark in the development of a potentially new constitutional role for the Vice President as chief operating officer of the Executive Branch."\textsuperscript{256} Reducing agency losses, however, will require the development of effective methods of monitoring.\textsuperscript{257} The administration's planning and coordination process, described below, should help meet this objective.\textsuperscript{258} 

\section*{B. Secrecy}

The Order ends much of the secrecy that marked White House oversight in the two prior administrations.\textsuperscript{259} After a regulatory action has been published in the Federal Register (or is otherwise resolved), OIRA will make available to the public "all documents" exchanged between it and an agency during the review of a rule,\textsuperscript{260} including the agency's regulatory impact analyses,\textsuperscript{261} the written justification for returning a regulation to an agency,\textsuperscript{262} and any substantive written communications received from persons outside of the government.\textsuperscript{263} Moreover, OIRA will maintain a public log that lists the status of rules under review and that identifies persons from outside the government from whom it has received written and oral communications concerning such rules.\textsuperscript{264} After a regulatory action has been published in the Federal Register (or is otherwise publicly issued), agencies will identify the substantive changes between the version of a rule that was submitted

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\item 250. See supra notes 90–92 and accompanying text (discussing how prior OMB review presented same monitoring and control problems as the agencies).
\item 251. Exec. Order 12,866, supra note 248, at § 6.
\item 252. Id. § 2(c).
\item 253. President Clinton instructed the administrator of OIRA to report to the Vice President in six months concerning the agency’s regulatory review activities. Daily Rep. for Executives (BNA) (Oct. 1, 1993).
\item 254. Exec. Order 12,866, supra note 248, at § 5(c).
\item 255. Id. § 7.
\item 257. See supra note 44 and accompanying text.
\item 258. See infra notes 272–77 and accompanying text (explaining how the planning process can reduce the monitoring burden). For example, the Clinton administration hopes that the Vice President's review of regulatory priorities will reduce the number of disputes that he must resolve between OIRA agencies. Stephen Barr, White House Shifts Role in Rule-Making; Clinton Seeks to End Closed-Door Process, WASH. POST, Oct. 1, 1993, at A1.
\item 259. For a description of prior secrecy, see supra notes 148–52 and accompanying text.
\item 260. Exec. Order 12,866, supra note 248, § 6(b)(4)(D).
\item 261. Id. § 6(a)(3)(E)(i).
\item 262. Id. § 6(b)(3).
\item 263. Id. §§ 6(b)(4)(B)(D).
\item 264. Id. § 6(b)(4)(C).
\end{enumerate}
\end{footnotesize}
to OIRA and the version that the agency adopted, and will indicate which changes resulted from OIRA recommendations.\footnote{265} The goal of these disclosures is "to restore the integrity of centralized review and do it in a way that is more open and accountable to the public."\footnote{266} Although the Order goes a long way in meeting that goal, the administration can take one more step to establish accountability. The Order does not mandate that OIRA disclose written communications from persons outside of government until after a rule has been published,\footnote{267} and there is no requirement that oral communications be summarized and disclosed.\footnote{268} The Order does require that the "subject matter" of such oral communications be disclosed; however, this does not appear to require anything more than the identification of which proposed rule was discussed.\footnote{269} As noted earlier, when conduit communications remain secret, they are unfair to other parties who do not have an opportunity to rebut them, and they increase the likelihood of agency reliance on unreliable information.\footnote{270}

C. Micromanagement

Finally, the White House has taken two steps that could lessen micromanagement. First, OIRA review is limited to "significant regulatory actions," which are regulations that will either have an annual regulatory effect of $100 million or raise important policy issues.\footnote{271} On an annual basis, agencies are required to submit to OIRA a list of planned regulatory actions and specify which are significant; regulatory review is restricted to those rules or any others that OIRA might add.\footnote{272} Second, the Order establishes a planning process to compare proposed rules with administration goals,\footnote{273} and a coordination process to look at consistency among agencies.\footnote{274} In the planning process, the Vice President and his advisors will discuss with agencies their regulatory agenda, and the OIRA administrator will review the agenda for consistency with the President's priorities and the principles set forth in the Executive Order.\footnote{275} In the coordination process, the Vice President and his advisors will review each regulatory agenda for consistency with other agencies,\footnote{276} and any agency can object that another's plans are inconsistent

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\item \footnote{265}{Id. §§ 6(a)(3)(E)(ii)-(iii).}
\item \footnote{266}{Viveca Novak, The New Regulators, 25 Nat'l J. 1801, 1801 (July 17, 1993) (quoting Sally Katzen, Director of OIRA).}
\item \footnote{267}{See supra note 263 and accompanying text.}
\item \footnote{268}{See supra notes 261-63 and accompanying text. The Order, however, does restrict oral communications to the administrator of OIRA concerning regulations that are under review. Exec. Order 12,866, supra note 248, § 6(b)(4)(A).}
\item \footnote{269}{Id. § 6(b)(4)(C)(iii).}
\item \footnote{270}{See supra note 186 and accompanying text.}
\item \footnote{271}{Exec. Order 12,866, supra note 248, §§ 3(f), 6(b)(1). Besides the monetary test, a regulation is "significant" if it creates a serious inconsistency or otherwise interferes with another agency, has a material budgetary impact, or raises novel legal or policy issues. Id. § 3(f).}
\item \footnote{272}{Id. § 6(a)(3)(A).}
\item \footnote{273}{Id. § 4.}
\item \footnote{274}{Id.}
\item \footnote{275}{Id. §§ 4(a), (c)(5).}
\item \footnote{276}{Id. § 4(c)(5).}
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with its own.\textsuperscript{277} In addition, the Order authorizes the establishment of "Regulatory Working Groups," which will coordinate the development of regulatory tools and common policies among agencies that have similar goals and responsibilities.\textsuperscript{278}

The restriction of OIRA review to significant rules, which the administration estimates will reduce OIRA's workload by about one-third,\textsuperscript{279} reduces micromanagement by eliminating less important regulations from review. Nevertheless, the administration may still be engaging in more review than is feasible or functional. Review of all significant rules may not be feasible because OIRA officials will presumably be busy in the planning and coordination functions, which will leave less time for review of individual rules. If OIRA officials create more time for such review by ignoring their planning and coordination responsibilities, the review process would not be functional. As noted earlier, OIRA should emphasize planning and coordination because it is the only government agency in a position to carry out these functions.\textsuperscript{280} Moreover, the administration's planning and coordination functions should reduce the need for OIRA to monitor proposed rules as closely.\textsuperscript{281}

Fortunately, the Order permits OIRA to fine-tune the review process by exempting additional rules from review.\textsuperscript{282} As noted earlier, where preliminary data indicate that a regulation is clearly consistent with the administration's goals, OIRA should eliminate the burden on agencies of undertaking extensive reporting requirements.\textsuperscript{283}

\section*{VI. Conclusions}

The increase in political oversight over the last twelve years has reduced the discretion of administrative agencies, but the result has not been more democracy or better regulatory policy. Elected officials have exercised power over policy without being accountable and have engaged in counterproductive micromanagement. The end of divided government is likely to moderate this behavior, but it is unlikely to end it. Besides the fact that the Congress and the White House will continue to have policy disagreements, the oversight game will continue because the White House's comparative advantage in oversight threatens Congress's ability to assert its own influence, especially in light of the administrative presidential strategy continued by President Clinton.

The additional disclosure mandated by Executive Order 12,886 will help to cement the legitimacy of White House oversight, and the administration's plan-

\begin{itemize}
\item \textsuperscript{277} Id. \S 4(c)(7).
\item \textsuperscript{278} Id. \S 4(d).
\item \textsuperscript{279} Clinton Signs Regulatory Review Order; Issues Instructions to Agencies, OIRA, 61 Banking Rep. (BNA) 514 (Oct. 4, 1993).
\item \textsuperscript{280} See supra part IV.B.1.
\item \textsuperscript{281} See supra note 210 and accompanying text (arguing that a regulatory agenda review would reduce the need for micromanagement).
\item \textsuperscript{282} Exec. Order 12,866, supra note 248, \S 6(b)(2).
\item \textsuperscript{283} See supra note 211 and accompanying text.
\end{itemize}
ning and coordination efforts will make it possible to reduce micromanagement. The President, however, is more likely to pull back from close supervision of agencies if Congress adopts its own additional disclosure policies and retreats from its use of micromanagement. In other words, some sort of "treaty" between Congress and the White House may be necessary to recapture the gains available from the application of agency expertise and experience. This "treaty" should establish a process by which the two branches can conduct a dialogue on regulatory policy. Congressional hearings on each agency's regulatory agenda could serve this purpose.

The last twelve years reveal that a more constructive balance should be struck between political oversight and agency discretion. The problem "is not to have one of these values completely dominate . . . but to provide a creative dialogue or synthesis between the two."284 The end of government divided between political parties should make it easier to find an appropriate balance, but this result is not inevitable. Hopefully the experience of the last twelve years will provide the necessary impetus.

284. Aberbach & Rockman, supra note 125, at 608.